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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, MITSUI STEAMSHIP CO., LTD., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, Secretary of Agriculture,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE PETITIONERS

Opinions Below

The majority and concurring opinions of the Court of Appeals (R. 237-248) are reported at 99 U. S. App. D. C. 312, 239 F. 2d 933.

Jurisdiction

The jurisdiction of this Court is invoked under 64 Stat. 1132, 5 U. S. C. § 1040, and 62 Stat. 928, 28 U. S. C. § 1254 (1). The judgment below was en-

tered on November 9, 1956. The petition herein was filed on February 1, 1957, was granted on March 25, 1957 (353 U. S. 908) together with the petition of the Federal Maritime Board (No. 73, October Term, 1957), and the two cases were consolidated (R. 250).

Question Presented

The Federal Maritime Board, after extensive hearings and exhaustion of intermediate procedures, entered an order pursuant to § 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U. S. C. § 814, approving an agreement among the members of the Japan-Atlantic and Gulf Freight Conference, common carriers by water in foreign commerce, to institute a dual-rate system under which they would establish one level of rates for shippers who sign contracts to ship exclusively by vessels of such of the Petitioners as they may select at the time of shipment, and another level of rates 9½% higher for shippers who do not sign such contracts. The Board found that, in the interests of shippers and carriers alike, the system agreed upon, as modified by the Board, was necessary to avoid destructive rate wars and restore and insure stability of rates and service to shippers in the trade; and that the approved system of rate differentials would not be monopolistic in its effect, nor prevent non-Conference competition from receiving at least a fair share of the traffic; and that the system would facilitate our foreign commerce. The Court of Appeals set this order aside on the ground that, even though it might agree that the objectives the Board sought in approving the dual-rate system in question are consistent with the objec-

tives of the Shipping Act, and despite the Board's findings, the dual-rate system is illegal *per se* under § 14, Third, of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U. S. C. § 812, Third.

The question presented is whether such a dual-rate system is illegal *per se* under § 14, Third, of the Shipping Act, 1916, 46 U. S. C. § 812, Third, with the result that the Board[1] is without power to approve, under § 15 of that Act, 46 U. S. C. § 814, an agreement among such common carriers to use such a system.

Statute Involved

The statutory provisions directly involved are §§ 14 and 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U. S. C. §§ 812, 814. These provisions, together with other pertinent provisions of the Shipping Act, are printed in the Appendix hereto.

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[1] The United States Shipping Board was the agency which was established by § 3 of the Shipping Act, 39 Stat. 729, and which was charged with the administration of that Act. Subsequently, by Executive Order June 10, 1933, No. 6166, § 12 (set out in note under 5 U. S. C. A. § 132), the United States Shipping Board was abolished and its functions were transferred to the Department of Commerce. Thereafter, by the Merchant Marine Act, 1936, 49 Stat. 1985, the United States Maritime Commission was created and the functions of administering the Shipping Act were transferred to it. Finally, the functions of the United States Maritime Commission have been transferred to the Federal Maritime Board, pursuant to the provisions of the Reorganization Act of 1949, 63 Stat. 203-207, 5 U. S. C. §§ 133(z) to 133(z)-15, and Reorganization Plan No. 21 of 1950, 15 F. R. 3178, 5 U. S. C. A. following § 133(z)-15. The Federal Maritime Board and its predecessors are referred to in this brief as "the Board."

Statement of the Case

A. Introductory.

By prehearing stipulation in the Court of Appeals, as amended by an order of a judge of that court (R. 229-235), the factual basis for the resolution of the legal issues herein is to consist of "the facts existing in the Administrative Record as found by the Board." Accordingly, our statement of the case is derived from the Board's report (R. 19-69) except with respect to aspects of the procedural history of this litigation not encompassed therein.

B. The Conference.

The Petitioners are 17 common carriers of cargo by water from ports in Japan, Korea and Okinawa to ports on the Atlantic and Gulf of Mexico Coasts of the United States (Japan-Atlantic and Gulf Trade). Five of the Petitioners are American companies, 8 are Japanese and 4 are of other nationalities (R. 23). These 17 Petitioners (the Conference Members) are parties to an agreement (the Conference Agreement) approved by the Board under § 15 of the Shipping Act and designated Board Agreement #3103, as amended, establishing the Japan-Atlantic and Gulf Freight Conference (JAGFC) (R. 23-24). JAGFC is not a monolithic giant pitting its strength against the frail resources of Isbrantsen Co., Inc. (Isbrandtsen), which operates the only non-conference common carrier service in the Japan-Atlantic and Gulf Trade (R. 25). The only combined action contemplated by the Conference Agreement is that the

Conference Members shall charge uniform rates which they shall determine by a two-thirds vote (R. 137-152). Otherwise the Petitioners operate their vessels for their own account and profit; conduct their own businesses in such manner as their respective managerial judgments may determine; build such ships to be used in the trade as they may think most appropriate; have as many or as few sailings as they may deem best; and actively solicit cargo from all potential shippers. There is no pooling of earnings, and the Conference Agreement gives no member a financial interest in the operations of any other member.[2]

Free of any restriction on competition in quality of service, many of the Conference Members have introduced vessels of great speed and having special characteristics which adapt them to the Japanese-American trade, such as refrigerated space and strong

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[2] We have found no better definition of a conference than that which appears in *British Shipping in the Orient* (38th Report of the Imperial Shipping Committee, 1939) 51, quoted in Marx, *International Shipping Cartels* (1953) 250-251. The observations of Professor Marx and the quotation from the Imperial Committee are as follows:

> "One of the salient characteristics of shipping conferences, and one which has been influential in keeping profits from remaining excessive, has been the fact that conferences are not absolute monopolies. It is important to remember that shipping conferences are not combines linked by shareholdings or any other form of common ownership. It will be recalled that the Imperial Shipping Committee described them as follows: 'A shipping conference is a meeting in which competitors face one another with the object of achieving that minimum of cooperation which will suffice to prevent such chaotic competition as might render impracticable the liner system of working ships. Each member of a conference is seeking the minimum surrender of his competitive freedom which is compatible with this object; his attitude in debate is determined by the sources of strength which lie behind his diplomacy'."

rooms for the carriage of silk (R. 25). Isbrandtsen has supplied no such advanced types of tonnage (R. 35).

The Conference Agreement throws membership open to "any common carrier regularly operating or giving substantial and reliable evidence of intention to operate regularly in the trades covered by this agreement * * *" (R. 144), upon the payment of an admission fee of $1,000.00 (R. 145). This provision, coupled with the rule enforced by the Board, that conferences must admit to membership all common carriers able and willing to operate in the trade (*e. g., American-Hawaiian Steamship Co. v. Intercontinental Marine Lines*, 4 F. M. B. 160 (1953), and cases there cited), removes limitations upon the number of lines which may become members.

The loose nature of the Conference structure is thus apparent.

C. Economic History.

From 1928 to the outbreak of World War II, JAGFC and predecessor conferences had established and maintained a dual-rate system (R. 24-25). Upon the resumption of private steamship operation following World War II, JAGFC did not immediately reinstitute the dual-rate system.

Isbrandtsen operates a common carrier service in the Japan-Atlantic and Gulf trade, which it commenced not long after the close of World War II. Although invited to join JAGFC and entitled to membership, Isbrandtsen has declined to become a party to the Conference Agreement. It has, since

April, 1949, maintained its service at approximately fortnightly intervals via the Panama Canal (R. 25).

Isbrandtsen did not maintain tariffs which were *independent* of the JAGFC tariffs. Instead, Isbrandtsen's rates were, on the average, fixed at approximately 10% below the corresponding JAGFC rates. The general understanding of the shipping public was that Isbrandtsen would underquote JAGFC rates by 10%. This understanding was encouraged by the issuance by Isbrandtsen's Tokyo agents of "abbreviated freight tariffs" setting forth in parallel columns the Isbrandtsen and JAGFC rates on major commodities, from which it appears that on most items the Isbrandtsen rates were 10% below the JAGFC rates (R. 29). Whenever JAGFC rates were increased, Isbrandtsen's rates were correspondingly increased (R. 68).

The existence of a conference with a stable rate structure is both an invitation to, and a necessary condition of, such an operation as Isbrandtsen has been conducting. Competition among shippers and consignees inexorably impels them to fill the ships of the rate-cutting, non-conference operator, while the conference lines, which hold over it the "umbrella" of a stable rate structure, see their vessels depart with partial cargoes.[3] The operation of this principle in the Japan-Atlantic and Gulf trade is dramatic-

[3] A pithy statement of this principle appears in Marx, *International Shipping Cartels* (1953) 196:

"The fact remains that non-conference services continue to operate independently, despite their ability to join the conferences; and furthermore they do not generally charge conference rates. Why is this so? They must operate independently because it is to their advantage to do so. An independent line may have more flexibility in scheduling, but it will invariably have more flexibility in rate-making than

ally revealed in Table I of the Board's Report (R. 27). The statistics there tabulated show that during the three years 1950, 1951 and 1952 Isbrandtsen, with only 11% of the sailings in the Japan-Atlantic and Gulf trade, secured 30% of the *total* common carrier cargo transported in that trade, notwithstanding the special facilities afforded by many of the Conference vessels and lacking on Isbrandtsen's vessels.[4]

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the conference lines which make rates by committee. (Except for the possibility of greater schedule flexibility, there is no reason why an independent line can operate at lower costs than conference members). Furthermore, the independent, by charging lower rates, can frequently fill his ships when conference vessels are not able to sail fully loaded. By riding under the conference 'umbrella' the independent may, if it does not cut rates too vigorously, enjoy the benefits of stability and still carry more than its normal share of remunerative cargo."

We also refer to the *Reports from Commissioners, Inspectors and Others*, Cd. 4668 (1909), 49.

[4] In various briefs in this litigation Isbrandtsen has totalled the carryings of the Conference Members and of Isbrandtsen in both the Japan-Atlantic and Gulf trade and the Philippines/Atlantic and Gulf trade (Table II, R. 27), and pointed to the approximate parity of these totals as indicating that Isbrandtsen did not gain the tremendous advantage over the Conference Members which we have asserted above. There are two reasons why this combination of totals is inappropriate.

In the first place, as the Board pointed out (R. 26), the traffic in these two trades differs markedly. The Japanese traffic produces much higher revenues per ton than does the Philippine traffic, which consists principally of bulk cargoes, and accordingly, the Japanese cargoes are much more desirable from the revenue point of view. All carriers give priority to Japanese cargoes to the extent that they are obtainable. It therefore is no solution to the competitive problem that Isbrandtsen's vessels have sailed full of Japanese cargo, and the Conference Members' vessels have sailed full of Philippine cargo.

Secondly, the proposal here in question relates to the Japan-Atlantic and Gulf trade alone. The objective of the proposed dual-rate system is to maintain stability of rates and service in the Japan-Atlantic and Gulf trade by ensuring a fair share of the traffic in that trade to the Conference Members, notwithstanding Isbrandtsen's rate practice in that trade. The cargo movement in other trades is irrelevant.

Isbrandtsen's 30% cannot fairly be contrasted with the remaining 70% as if JAGFC were an integrated unitary competitor. The 70% which Isbrandtsen did not carry was divided among 15 individual and independent Conference Members so that they averaged less than 5% of the total cargo movement. Isbrandtsen's 30% amounted to six times this average. The impact of this disparity can be fully appreciated only when it is borne in mind that ocean shipping is an industry characterized by a high proportion of fixed operating costs, irrespective of the amount of cargo carried, a circumstance to which the Board refers implicitly in its Report (R. 62, 67).[5]

Thus, the Conference Members were suffering grievously charging full tariff rates, while Isbrandtsen, with only fortnightly sailings, was doing quite

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[5] The high proportion of fixed costs was established in a Congressional Investigation (H. R. Doc. 805, 63rd Cong., 2d Sess. 310, 420 (1914)).

In Marx, *International Shipping Cartels*, *supra*, at 19-21, it is estimated that once a vessel has been committed to a regular liner sailing, from 70% to 75% of the cost of its voyage becomes fixed. From this Marx concludes (*id.* at 21):

> "The crucial fact which appears from these estimates of costs is that, once a vessel has been scheduled by a liner operator or actually placed on berth by a tramp operator, a large proportion of the total expenses of the voyage has become fixed, and until the vessel is loaded 'full and down' it will be remunerative for that vessel to carry any additional cargo that can be procured so long as it pays anything in excess of the actual out-of-pocket expense involved. In trades where the flow of commerce is not balanced—and this is the case more often than not—both liners and tramps will be tempted to engage in cutthroat competition at least on the leg of the voyage on which cargo is light.
>
> "Increasing returns, especially important when fixed costs are high, depend on the existence of unused carrying capacity. Unused capacity is not only apt to occur periodically as a result of seasonal and cyclical fluctuations coupled with the imperfect mobility of vessels, but it has been a chronic condition which has plagued the industry in a large number of peacetime years. * * *"

well at rates which were 10% lower. The comparison of Isbrandtsen's *average* carryings per sailing with the *average* carryings of the Conference Members tells the story (Table I of the Board's Report, R. 27):

Year	Isbrandtsen's average carryings per sailing. (Revenue tons)	Conference Lines average carryings per sailing. (Revenue tons)
1949	3,016	1,317
1950	5,780	1,678
1951	4,450	1,261
1952	4,118	1,273
1953 (6 months)[6]	3,109	1,239

Late in 1952, Isbrandtsen publicized a plan to increase its service to three or four sailings per month (R. 61). Such an increase in service would inevitably have increased Isbrandtsen's participation in the traffic (R. 61).

Thus, Isbrandtsen's rate competition inevitably brought each Conference Member to a point where JAGFC must either adopt a competitive device to protect its members' carryings or, in large measure, abandon the Conference purpose of maintaining uniform and stable rates (R. 29). The third possibility, *i. e.*, the reduction of JAGFC rates to Isbrandtsen's level, was totally impracticable. Isbrandtsen's publicly proclaimed policy of cutting Conference rates rendered it certain that the initial effort to meet Isbrandtsen's rates would only be the first in a series of competitive rate cuts which would produce a level of rates ruinous to all concerned. Even if rates were

[6] On and after March 12, 1953, JAGFC opened rates on a wide range of items moving in heavy volume. The significance of this action will be explained below.

permitted to spiral downward, JAGFC could not hope to regain its lost traffic, since Conference rate action requires a deliberative voting process, whereas a single carrier, with no obligation of consultation, may reduce its rates instantaneously (R. 30).

Moreover, the reduction of Conference rates generally would have borne most heavily upon the American-flag Conference Members because of their high costs of operation. With respect to this subject, the Board found (R. 64):

> "We are unimpressed with this argument: even assuming that the conference's more cumbersome rate-making processes are adaptable to such a method of competition, success in eliminating Isbrandtsen through this type of rate warfare would be accomplished at the price of simultaneous elimination of those American-flag lines, present or potential, whose operating costs parallel those of Isbrandtsen. Such a result would be repugnant to the ultimate purposes stated in the title of the act which include 'the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with . . . foreign countries.' The dual rate system here, on the other hand, is consistent with that purpose. The spread between contract and non-contract rates in the proposed system, based in part on the percentage by which Isbrandtsen most frequently underquotes conference tariff rates will reasonably enable the conference to meet Isbrandtsen's competition *without*, as in the method of uniform conference rate reduction preferred by Isbrandtsen, eliminating a *single* American carrier from the trade." (Italics those of the Board.)

In practical terms, rate reductions, in an effort to meet Isbrandtsen's levels, offered a less attractive solution to JAGFC than did the opening of rates, *i. e.*, the suspension of Conference control of rates so as to leave each line, Conference and non-Conference, in unrestricted rate competition. In either case the result would be a rate war and potential economic disaster.

By December 24, 1952, JAGFC had determined to solve its problems by filing a detailed statement (R. 153-206) of its proposal to institute the dual-rate system pursuant to the Board's then recently promulgated General Order 76, § 3 (R. 72),[7] which would permit such a proposal to become effective after 30 days unless, on the basis of objections or of its own motion, the Board should postpone its effectiveness. The system then proposed, with modifications subsequently directed by the Board, is the system now before this Court. Its details are set forth below under a separate head. Isbrandtsen and the Department of Justice protested and requested postponement of the system pending the outcome of a hearing on their protests. The Board granted the request for a hearing but denied the postponement.

The court below, by interlocutory injunction in an earlier review, stayed so much of the Board's order as denied the postponement and enjoined JAGFC from instituting the system.[8]

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[7] 46 C. F. R. § 236.3, 17 F. R. 10175, 17 F. R. 10560.

[8] The court announced in chambers on February 3, 1953, that it was of opinion the interlocutory injunction should be granted. The order granting same was made and filed on March 23, 1953. The court's final order in that proceeding set aside so much of the Board's order as had been stayed and enjoined the Conference

Thus, in March 1953, after the interlocutory injunction had been announced JAGFC found itself faced with an indefinite postponement of the institution of its dual-rate system.

A rate war, which was under the circumstances inevitable, actually came to pass. JAGFC, deprived of its only defense, and unable further to endure the loss of traffic, on March 12, 1953, opened rates on ten major traffic items, and on succeeding dates in the spring of that year opened rates on most items of importance in the Japan-Atlantic and Gulf trade. The result was a rate war in which rates, utterly lacking in stability, plunged about 60% to 70%, and in some instances even below loading and discharge costs (R. 30-31). The effect of this rate war upon the shippers and the commerce of the United States generally was catastrophic, as merchants were no longer able to fix prices for necessary advance periods (R. 32).

D. The Proposed Dual-Rate System.

The dual-rate system which JAGFC proposed to reinstitute was adopted after a study extending over approximately two months, during which JAGFC compiled an entirely new tariff of proposed contract and non-contract rates (Tariff No. 30).

The new contract rates were almost uniformly lower than the corresponding rates under the single tariff then currently in effect (R. 29). A 9½% spread be-

from instituting the dual-rate system until the Board should specifically approve thereof pursuant to § 15 of the Shipping Act. *Isbrandtsen Company, Inc.* v. *United States*, 211 F. 2d 51, cert. denied *sub nom. Japan-Atlantic & Gulf Freight Conference* v. *United States*, 347 U. S. 990 (1954).

two contract and non-contract rates was arrived at for the reasons set forth in the Board's Report (R. 32-34, 62, 64). To avail themselves of the contract rates, the shippers, whether buyers or sellers, would have to agree to ship only on vessels of Conference Members—an agreement subsequently modified by the Board to exclude refrigerated cargoes in which Ishrandtsen, for lack of equipment, could not compete with Conference Members (R. 203, 205, 76).[9]

At the same time the Conference Members agreed to carry the shipper's cargo at contract rates so far as their regular services are available and "to maintain a shipping service which shall be adequate to meet the reasonable requirements of the commerce".[10]

Furthermore, if the vessels of the Members should be unable to provide space within a stipulated notice period, the shipper could use non-Conference vessels without liability. This right, it should be observed, is not the shipper's exclusive remedy in such a situation, for if the Conference Members have failed to perform their obligations, they are still responsible for damages resulting from any breach (R. 204).

The contract rates may be reasonably increased, but only at the end of the second full month after the month during which notice of increase shall be given (R. 203), so that the shipper has a firm com-

[9] The Board's explanation for the changes in the contract form appears in the Report (R. 63, 65-66, 68-69).

[10] The court below mentioned only the carriers' obligation stated in Article 2, of the contract and on that basis held that the shipper's contract was "almost illusory" (R. 247; 239 F. 2d at 940). Apparently the court overlooked the provisions of Article 4 (R. 204).

nitment as to the rate for a minimum of two months; but the shipper has the right to terminate the contract on three months written notice, as do the Conference Members (R. 205).

If the shipper makes any shipment in violation of the contract, he agrees to pay as liquidated damages 50% of the freight which he would have paid had the shipment been made on a vessel of one of the Conference Members at contract rates (R. 204, 205). This is the provision which looms so large in the opinions of the court below.

E. The Board's Decision.

By the time the final order of the Court of Appeals on the first review was entered, the hearings before the Board's Examiner had been completed. The record thus compiled consisted of more than 4,500 pages of testimony and in excess of 150 exhibits.

After all available intermediate administrative procedures had been pursued to finality (R. 22-23), the Board issued its report, dated December 12, 1955 (R. 19-69).

After a narrative statement of its findings of fact (R. 23-37), the Board's Report completely reviewed the judicial and administrative decisions concerning dual-rate systems (R. 38-60), and concluded that the dual-rate system is not illegal *per se* and should not be disapproved unless, upon the facts, the system would offend against § 15 of the Shipping Act (R. 60).

The Board took as its guiding principle the statement by this Court in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304 (1937), of the administrative determination to be made in such cases (R. 44, 67). The Board found the harmful effects of rate instability on United States foreign commerce and the merchants engaged therein as follows (R. 32):

> "Many Japanese shippers have requested the conference to close rates and to end the rate war. The resultant instability has affected the smooth flow of commerce between Japan and the United States; has raised a threat that customs duties in the United States might be increased; has affected the value of inventories of Japanese goods in the United States; has caused requests for postponement of shipments by F. O. B. buyers in the United States, since such buyers assume the risk of fluctuating freight rates. Prices for the sale of Japanese goods are often fixed by the importers in the United States as much as six months in advance of their arrival in the United States."

The Board also found that Isbrandtsen for several months had participated in the free-for-all rate cutting which is characteristic of a rate war and later attempted to stabilize rates at about 50% of the levels of JAGFC's pre-rate war tariff. The Board concluded that the instability of rates thus created was not in the interests of the maritime commerce of the United States and justified resort by the Conference to a dual-rate system which would introduce a stable rate structure for this commerce. The Board further found that after institution of the dual-rate system Isbrandtsen, far from being excluded from the trade, would carry 10% or more of the cargo moving in the Japan-Atlantic and Gulf trade and that, "when com-

pared with the lesser average percentage [about 6%] which will be enjoyed by the conference lines; Isbrandtsen's 10 percent would be at least an equitable share of the trade" (R. 34-35, 62).

After reviewing the effect of the proposed 9½% spread upon shippers and carriers, the Board concluded that the differential was reasonable and not unjustly discriminatory with respect to either shippers or carriers (R. 62-64). It concluded, indeed, that the effect of the proposed system, by relieving the pressure on JAGFC to meet Isbrandtsen's rate competition, would create greater stability of rates and service, facilitate forward trading by shippers, and decrease the threat of rate wars (R. 61-62).

The Board therefore found that the agreement for the dual-rate system, under the criteria of § 15, should be approved, subject to modification of the proposed form of contract with shippers to which reference has been made.

The Board's order of January 10, 1956 (R. 75-76), which superseded and cancelled its earlier order of December 21, 1955 (R. 73-74), approved under § 15 the JAGFC dual-rate agreement, modified to the extent hereinabove indicated.

On December 19, 1955, Isbrandtsen filed in the court below its petition to review the Board's Report and the Orders entered thereon (R. 2-18). The United States was a respondent pursuant to 64 Stat. 1130, 5 U. S. C. § 1034, but, appearing by the Department of Justice (which had participated in the proceedings before the Board in opposition to JAGFC), joined Isbrandtsen in attacking the Board's Order.

The Secretary of Agriculture, who had intervened in the proceeding before the Board in opposition to the position of JAGFC, likewise intervened in the proceeding for review and joined in the brief of the Department of Justice. The Board was made a respondent pursuant to Rule 38(a) of the Court of Appeals, and JAGFC intervened by leave of the court. Both supported the Board's Order.

The final decision of the Court of Appeals, rendered almost four years after JAGFC resolved to file its statement under General Order 76, set aside the Board's approval and rested squarely on the proposition that § 14, Third, of the Shipping Act prohibits dual-rate systems (R. 241-248; 239 F. 2d at 936-939).

F. The Opinions Below.

Two opinions were rendered below. Fahy, Cir. J., wrote the opinion of the court which we shall refer to as the principal opinion; and Washington, Cir. J., wrote a concurring opinion in which all of the judges concurred. The principal opinion held that it could not substitute its judgment on the facts for the judgment of the Board (R. 243; 239 F. 2d at 937-938) and that the court might agree with the Board that the objective of re-establishing and maintaining stability of rates and services is consistent with the purposes of the Act (R. 241; 239 F. 2d at 936), and, "True it is, as the Board urges with much persuasion, the dual-rate system may be very potent in promoting stability and regularity of service and may be warranted by competitive considerations; * * *." (R. 242; 239 F. 2d at 937). Further, the court stated that the dual-rate system is not one of the methods spe-

cifically condemned by § 14, as are deferred rebates and fighting ships (R. 243-244; 239 F. 2d at 938), and that it had found in the legislative history of the Act no indication of an explicit intention by Congress to outlaw the dual-rate system as is found with respect to deferred rebates and fighting ships (R. 245; 239 F. 2d at 938).

The court held that since the non-contract rate is charged for failure to enter into a contract rather than for actually shipping via a non-conference carrier, "the higher rate constitutes retaliation because it is charged for failure to contract with the Conference. Section 14, Third, applies not only to retaliation for shipping by another carrier but for 'any other reason,' which would include failure to enter into the exclusive contract arrangement" (R. 242; 239 F. 2d at 937). The court also said on this point: "[B]ut when at the same time the system constitutes retaliation and is also discriminatory it runs into the barrier of section 14, Third, however desirable it otherwise might be" (R. 242; 239 F. 2d at 937).

After mentioning the cases decided by this Court which are discussed in our Second Point, *infra*, the court disposed of them as follows: "From this situation in the courts the Board contends that the dual-rate system has not been considered invalid per se, otherwise the courts would have disposed of these cases, on that ground. This position is an arguable one; but the fact is that the cases do not decide the point" (R. 244; 239 F. 2d at 938).

The concurring opinion, after stressing the view that the dual-rate system is, as a matter of law, retaliatory, expressed the opinion that the legislative

history of the Shipping Act, which indicates that the Committee which reported on it condemned deferred rebates and fighting ships, but not dual-rate systems, is not entitled to weight for the reason that the type of shipper's contracts employed in 1913, during the Congressional investigation, were different from the type of contracts now employed. Judge Washington found that the 1913 contracts were firm as to price and the obligation of the carriers to transport, whereas the shipper's contract today is "almost illusory" and the rates are subject to increase. Further, he found that in the 1913 contracts there was no provision for liquidated damages, and that "these differences are dispositive of the Board's principal argument" (R. 246-248; 239 F. 2d at 939-940).

SUMMARY OF ARGUMENT

I

The Statutory Language

No national policy accords to antitrust concepts an overriding effect upon statutes providing administrative regulation of specific industries.

An examination of the Shipping Act as a whole demonstrates that Congress concluded that our ocean-borne commerce could prosper only under supervised private control of competition by conferences. Shippers, carriers and the public generally would thus be protected from any improper practices of the conferences by the power of the Board to strike down action violative of the standards laid down by the

Act. The Act committed to the Board under such standards a defined power of discretion, but carved out of this broad discretionary power three limitations. These are contained in the first three subdivisions of § 14 of the Act, which condemn as illegal *per se* very specifically defined practices in which carriers are forbidden to engage on pain of heavy fines.

The first subdivision clearly defines and condemns "deferred rebates". The second clearly defines and condemns the "fighting ship". The third is the one upon which the court below predicated its decision that the dual-rate system had been rendered illegal *per se* by the Shipping Act. It reads as follows:

> "Sec. 14. That no common carrier by water shall, directly or indirectly * * *
>
> * * * * *
>
> "Third: Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

Subdivisions First and Second clearly treat of and prohibit objectionable *rate* practices. The foregoing language of Subdivision Third does not even mention rates, whether on a single or a dual standard, or contracts with shippers for exclusive patronage. The Court of Appeals could find no specific prohibition of the dual-rate system (R. 243-244; 239 F. 2d at 938).

We contend that Subdivision Third deals with types of carrier practices having no relation at all to freight

rates which are dealt with expressly in other sections of the Act. A specific type of practice is mentioned, *i. e.*, retaliation by refusal of space accommodations when such are available—the denial of a common carrier facility or service. It has nothing to do with rates. We contend that the otherwise vague language, "resort to other discriminating or unfair methods," takes on meaning only by reference to the specifically enumerated objectionable practice: in short, that, in the light of the entire Act, its design and history, this is a clear case for the application of the *ejusdem generis* rule.

A suggestion as to the types of practices which are proscribed by Subdivision Third when pursued in retaliation for shipper's conduct may be garnered from items (b) and (c) of § 14, Fourth, *i. e.*, discrimination in the loading and landing of freight in proper condition or the adjustment and settlement of claims. Such interpretation gives reasoned effect to the *ejusdem generis* rule since it imports the refusal to receive and properly deal with cargo in return for the refusal to ship cargo.

This interpretation lends symmetry to § 14, in contrast with the incongruity of the Section when interpreted in accordance with the opinion below. If the dual-rate system is, in and of itself, a discriminating or unfair method in retaliation for the shipper's employment of competitive tonnage, then *a fortiori* the deferred rebate, specifically proscribed in Subdivision First, is a discriminating or unfair method similarly in retaliation. Subdivision First would then become surplusage.

The suggestion in the opinions below, that the charge of a higher rate to a non-contract shipper is, as a matter of law, a retaliation against him because he did not contract, appears erroneous. In normal course, anyone who contracts and gives a required consideration expects to obtain advantages not enjoyed by one who does not contract and give the consideration. This truism applies to exclusive patronage contracts, as well as others. Such conduct is not retaliatory *per se*. Before the conduct of the vendor toward a non-contractor may be deemed retaliatory, additional facts must be found. If the less advantageous treatment of a non-contractor is reasonably necessary in the conduct of the vendor's business or in the public interest and no motive of inflicting injury is present, no retaliation exists. Findings of these factual and economic aspects of the practice should, as to ocean carriers, be made by the Board. If it finds the practice to constitute retaliation, the *per se* prohibition attaches, but not otherwise. The court below gave no effect to the findings of the Board with respect to the economic necessity, in this case, of a dual-rate system and of the reasonableness of that system. Those findings are inconsistent with the concept of retaliation. Nevertheless, the court below, ignoring these findings, held as a matter of law that the charge of the higher rate to the non-contracting shipper constitutes retaliation and as such is prohibited by the Shipping Act.

The opinion below also found a separate element of illegal retaliation in the liquidated damages provision of the exclusive patronage contract. We submit that if the dual-rate system is not otherwise illegal *per se*, the inclusion in the contract of a reasonable provision

for liquidation of damages imports compensation for the injury done, not retaliation. If the liquidated damages provision is penal rather than compensatory, it will, of course, not be given effect, irrespective of whatever motive may have animated it.

II

The Decided Cases

We submit that prior decisions of this Court are authority for the proposition that the dual-rate system is not illegal *per se*.

United States Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474 (1932), involved a complaint by a non-conference competitor seeking an injunction against a conference dual-rate system with coercive differentials. The complaint charged violation of the antitrust laws. This Court held that the complaint should be dismissed since the Shipping Act, *pro tanto,* superseded the antitrust laws, and the determination whether a dual-rate system violates the Shipping Act, including § 14, was for the primary jurisdiction of the Board on all the historic and economic facts. The Court did not withhold from the Board's jurisdiction the question whether the dual-rate system is retaliatory. The dismissal of the complaint would not have followed merely because it stated no claim for relief under the Sherman Act, if the facts alleged constituted a *per se* violation of § 14, Third, or any other section of the Shipping Act. This is true both as a matter of basic principles of equity jurisprudence and in accordance with the doctrine that in a case involving only a question of law, there is no call for the

application of the primary administrative jurisdiction rule (*Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922)).

The ruling in *U. S. Navigation Co.* was reaffirmed in an antitrust suit brought by the United States in *Far East Conference* v. *United States*, 342 U. S. 570 (1952). The dissenting opinion, which rested in part on illegality *per se* under § 14, Third (342 U. S. at 578-579), indicates that the issue was squarely before the Court.

Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297 (1937), reviewed a decision by a three-judge statutory court that the dual-rate system, under any circumstances, was a violation of § 16 of the Shipping Act (18 F. Supp. at 27-8). This Court affirmed the decision, not on the ground that the dual-rate system was in and of itself a violation of § 16, but rather on the ground that the issue whether the discrimination involved was undue or unreasonable within the meaning of § 16 was for the Board to decide, and that in the case presented there was substantial evidence to justify the Board's conclusion that the particular system was unlawful on the facts presented. That this Court did not decide *Swayne & Hoyt, Ltd.*, without reference to § 14, is demonstrated by the footnote (300 U. S. at 307), in which the Court concluded that the dual-rate system did not, *per se*, violate that section. This footnote is holding, not dictum, since the Court could not have concluded that the Board had discretion under § 16 with regard to dual-rate systems if they were prohibited, *per se*, by § 14, Third.

III

The Administrative Interpretation

The Board has consistently condemned competition among carriers by means of rate cutting as inimical to our foreign commerce, where the rates of one of the competitors are generally fixed by deducting a given percentage from the corresponding rates of the other competitor or competitors. *Section 19 Investigation, 1935*; 1 U. S. S. B. B. 470 (1935); *Rates, Charges and Practices of Yamashita and O.S.K.*, 2 U. S. M. C. 14 (1939); *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U. S. M. C. 342 (1940). There is no provision of the Shipping Act which specifically prohibits such rate cutting practices. Accordingly, conferences which have experienced, or which have been threatened with, cut-rate competition have, over the many years since the adoption of the Shipping Act, employed the protective shield of the dual-rate system. These dual-rate systems have been attacked before the Board many times.

Without exception, the Board's decisions have held that the dual-rate system is not illegal *per se*. *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1 U. S. S. B. 41, 46, 48 (1922); *Rawleigh* v. *Stoomvaart*, 1 U. S. S. B. 285, 293 (1933); *Contract Routing Restrictions*, 2 U. S. M. C. 220 (1939); *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11 (1948).

This long and consistent administrative interpretation is entitled to weight. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472-473 (1915).

IV

The Legislative History

The Congressional purposes disclosed by the legislative history of the Shipping Act lend persuasive support to the interpretation we urge.

The enactment of the Shipping Act, 1916, was preceded by a thorough investigation by the Committee on the Merchant Marine and Fisheries of the House of Representatives (Alexander Committee). Although this investigation was undertaken in an atmosphere of hostility to combinations of ocean carriers (H. R. Doc. 805, 63rd Cong., 2d Sess. 8-10 (1914)), the conclusion was reached that rate making by agreement was necessary to secure advantages to American merchants which are enjoyed by their foreign competitors, and that abolition of conferences would not result in free competition, but in monopoly probably more complete than existed by virtue of such agreements (*id.* at 416). The Committee, however, recommended that all such agreements should be subjected to publicity and to regulation by an administrative agency so that unless they complied with legislative and administrative requirements they should be stricken down (*id.* at 418-420). The Committee did, however, recommend that certain abuses found by it to exist should be absolutely prohibited (*id.* at 421). The enumerated abuses make no reference to exclusive patronage contracts or dual-rates, notwithstanding that the Committee was fully aware of the conference practice of contracting with shippers for exclusive patronage in return for a reduced rate (*id.* at 290).

This legislative history is clear that the Congressional purpose was to endorse the conference system of rate making under proper controls as a beneficial instrumentality of United States commerce. It equally clearly was the purpose to withdraw from the Board's discretion by precise prohibitions certain abusive practices, while leaving to conferences as their protection against cut-throat non-conference competition all other devices, including the dual-rate system, so long as they should not in their details of application be found by the Board to be violative of the Act.

The Board, in its annual reports, has repeatedly informed Congress of its decisions in dual-rate cases. Nevertheless, although Congress has on a number of occasions amended the Shipping Act and has reviewed our national shipping policy and adopted a number of far-reaching statutes, it has never indicated, either in its committee reports or in its enactments, that the dual-rate system is illegal.

ARGUMENT

FIRST POINT

Section 14, Third, of the Shipping Act does not render the dual-rate system illegal *per se*.

(a) The Economic Background of the Shipping Act.

The Shipping Act, 1916, reflects Congressional policy, first embodied in the Interstate Commerce Act of 1887, to subject to regulation those industries in which

the presuppositions of a free competitive order are not present or in which competition would produce economically or socially undesirable results. The Shipping Act, moreover, as contrasted with the Interstate Commerce Act, deals with transportation which by definition involves more than one sovereignty in the course of each voyage. By virtue of our treaties of friendship and commerce, our government cannot, by the issuance of certificates of convenience and necessity, limit the number or character of the vessels of friendly countries which serve our commerce. The only feasible limitation would be the decrease of the number of American-flag vessels serving our ports—a limitation which runs counter to the declared policy of both the Shipping Act, 1916, and the Merchant Marine Act, 1936. There is, therefore, no governmental control upon oversupply of tonnage.

Furthermore, there can be no governmental fixing of rates because the minimum fixed for a particular voyage by one country might well exceed the maximum fixed by the other country. Only contacts at the diplomatic level could solve such an impasse. The result is that neither the United States nor any other nation has ever adopted any law authorizing any governmental agency to prescribe reasonable foreign ocean rates.[11] In all maritime nations the problem

[11] This statement is fully applicable to rates of individual carriers. With respect to conferences, while the Board has no authority to fix or pass upon the reasonableness of conference rates, it holds a powerful restraining hand upon conference rate action because of its authority to disapprove any conference agreement, and thus cause the dissolution of the conference, if it finds such agreement to operate to the detriment of the commerce of the United States (Shipping Act, § 15). *Edmond Weil v. Italian Line*, 1 U. S. S. B. B. 395, 398-399 (1935); *Section 19 Investigation*, 1 U. S. S. B. B. 470, 492-493 (1935); *Pacific Forest Industries v. Blue Star Line*, 2 U. S. M. C. 54 (1939); *Pacific Coast European Rates and Practices*, 2 U. S. M. C. 58 (1939).

has been solved by permitting the various ocean carriers engaged in each trade to form conferences which determine the rates to be charged by the conference members. In many nations these conferences act without government control, it apparently being their thought that enlightened self-interest would prevent carriers from injuring their shippers. In the United States, the Shipping Act, 1916, solved the problem by authorizing the organization of conferences and other groups of carriers, but required complete publicity of all agreements among carriers and subjected them to control and to regulation by the Board.

(b) The Role of § 14, Third, in the Regulatory Program.

It is only natural in the light of the foregoing that the very heart of the legislation adopted for the regulation of shipping should be a provision subjecting agreements and arrangements among ocean carriers in derogation of free competition to administrative sanction and visitation, and exempting approved agreements from the antitrust laws. Thus the very core of the Shipping Act is to be found in § 15. The first paragraph is the publicity paragraph, as follows:

> "That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; *giving or receiving special rates,* accommodations, or other special privileges or advantages; *controlling, regulating, preventing,*

or destroying competition; pooling or apportioning earnings, losses or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner *providing for an exclusive, preferential, or cooperative working arrangement.* The term 'agreement' in this section includes understandings, *conferences,* and other arrangements." (Italics supplied.)

The second paragraph gives the Board control over the effectiveness of any such agreement:

"The board *may by order disapprove,* cancel, or modify *any agreement,* or any modification or cancellation thereof, whether or not previously approved by it, *that it finds to be* unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, *and shall approve all other agreements,* modifications, or cancellations." (Italics supplied.)

Under this paragraph of § 15 agreements *may* be condemned by the Board because they are "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors." Here clearly lies a field for the exercise of administrative discretion in determining what discrimination is unjust and what unfair. Agreements *may* also be condemned if the Board finds that they "operate to the detriment of the commerce of the United States". Here again is substance particularly

fitted for the application of administrative *expertise*. Finally, agreements *may* be disapproved if the Board finds them "to be in violation of this Act". As we shall see, certain agreements and conduct thereunder may be in violation of the Act only if such agreements or conduct be found by the Board to be unjustly or unduly preferential or prejudicial or discriminatory (§ 14, Fourth, § 16 and § 17). As to this class of statutory violation, there is latitude for the exercise of administrative judgment.

There remains, however, a single class of agreements and conduct as to which Congress withheld from the Board any area of discretion. This is the class of agreements and acts which are declared illegal *per se* by § 14, First, Second and Third.

All agreements which the Board does not find to be in a prohibited category, and which the Board does not disapprove on one of the discretionary grounds, *shall be approved*. The presumption would seem to be in favor of approval, since no order or finding is prerequisite thereto; whereas specified findings must be made as a condition to disapproval, modification or cancellation. Further, under § 15, "Agreements existing at the time of the organization of the * * * [Board] shall be lawful until disapproved by the * * * [Board]."

From the foregoing considerations the grand design of the Shipping Act clearly emerges. This design contemplates combined action by carriers in the full glare of publicity, but subject at all stages to regulation by the Board, with three courses of conduct withheld from the Board's approbative power—three ex-

ceptions to the general program of promoting the public interest in ocean transportation by combined action of carriers under administrative regulation and control.

We submit that these three exceptions, being in derogation of the general legislative grant of discretion to the Board, should not be judicially extended beyond the meaning of the statutory language according to its usual acceptation.

In view of the comprehensive categories of agreements restrictive or destructive of competition which may be approved by the Board and so removed from the compass of the antitrust laws, §15 clearly evinces a considered rejection of normal antitrust philosophy as a criterion for ocean carrier regulation.

(c) Section 14, Third, Does Not Apply to Dual-Rate Systems or Any Rate Practices.

§ 14, Third, provides that no common carrier by water shall, directly or indirectly:

> "Third. *Retaliate against any shipper by* refusing, or threatening to refuse, space accommodations when such are available, or *resort to other discriminating or unfair methods, because such shipper has patronized any other carrier* or has filed a complaint charging unfair treatment, *or for any other reason.*" (Italics supplied.)

The court below interpreted the above italicized words as a proscription of the dual-rate system. It is our contention that § 14, Third, does not deal with rates or rate practices at all, but with an entirely different type of carrier practice which might, under certain circumstances, amount to retaliation.

All would agree that this provision prohibits a carrier from refusing or threatening to refuse space accommodations when such are available, in order to injure a shipper for past acts inimical to the carrier's interests. All must also agree that this provision lacks any specific mention of contracts, or rates, dual or otherwise. Accordingly, a heavy burden must rest upon him who would conjure from the inapt phrase, "resort to other discriminating or unfair methods," a description of the dual-rate system in a section of the statute which otherwise defines with exceptional particularity conduct which is illegal *per se*, and which makes any violation a misdemeanor punishable by a fine of as much as $25,000.00. It is axiomatic that penal statutes must not be stretched so as to bring within their purview any acts not specified by the language employed by the legislature. *Yates* v. *United States*, 354 U. S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957); *United States* v. *Resnick*, 299 U. S. 207, 209 (1936); *United States* v. *Wiltberger*, 5 Wheat. (18 U. S.) 76, 95-96 (1820). The point need not be labored that the phrases, "other discriminating or unfair methods," and "for any other reason," must be placed within limits fixed by the requirements of certainty imposed by the penal aspect of § 14, and logically required by the context of the entire section and its position in the regulatory framework created by the Shipping Act.

The clear and unambiguous prohibition of retaliatory denial of shipping space contained in § 14, Third, fits symmetrically into the pattern of § 14. Subdivision First of that section prohibits the deferred rebate. This competitive rate device in ocean transportation was so precisely defined that no uncertainty

can, with ordinary ingenuity, be created regarding its exact limits. By Subdivision First, common carriers by water are prohibited to—

> "First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term 'deferred rebate' in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement."

By this provision Congress prohibited the most potent rate device for securing the exclusive patronage of a shipper to a particular carrier or group of carriers. By conditioning the payment of the rebate upon exclusive patronage not only during the period of rendition of the service, but also during a period of deferment, and by continuing the deferred rebate practice for successive periods of transportation service, the carriers ensured that they would at all times have in their pockets large sums of money by way of earned rebates belonging to the shipper, which the shipper could recover only by continuing his exclusive patronage of the carriers. Thus the shippers were made continuously dependent upon the carriers period after period without any opportunity to disengage themselves without substantial financial loss.

The very precision with which this competitive device was defined would seem to signify that *it was not the goal of exclusive patronage as such which consti-*

tuted the evil to be abolished, but rather a very pernicious rate stratagem for securing exclusive patronage. The deferred rebate is illegal under § 14, First even when divorced from exclusive patronage. It is banned when employed "for any other purpose."

Subdivision Second named and described a competitive rate practice which was declared to be unlawful, namely, the fighting ship—the quotation of exceptionally low rates applying to a ship which is deliberately scheduled to take cargo at the same time and port as the vessel of the non-conference competitor.

Subdivision Third forbade the use by carriers of the practice of refusing or threatening to refuse space accommodations when such are available, in retaliation for patronage of another carrier. As will appear below from our discussion of the legislative history the Alexander Committee found that the practice of refusing or threatening to refuse space accommodations was used in conjunction with the deferred rebate system as a reinforcing method of requiring exclusive patronage from shippers. The prohibition of this practice when used in retaliation, like the prohibitions contained in subdivisions First and Second, is unqualified and precise. *It clearly does not encompass any practice with respect to freight rates.*

Subdivision Fourth of § 14 is to be contrasted with subdivisions First and Second, and that portion of subdivision Third which we have considered immediately above. This subdivision provides that no common carrier by water shall:

> "Fourth. Make any *unfair* or *unjustly* discriminatory contract with any shipper based on

the volume of freight offered, or *unfairly* treat or *unjustly* discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims." (Italics supplied.)

Here we find no *per se* prohibition, but rather the creation of offenses which require the application of administrative *expertise* to the facts of each particular case.

It is significant that Subdivision Fourth conditionally condemns volume contracts; but in clause (a) it also *conditionally condemns discrimination in the matter of cargo space accommodations or other facilities.* It would thus appear that refusal of space, when not practised as a method of retaliation was to be an offense only if in the judgment of the administrative agency it amounted to unfair treatment or unjust discrimination.

Clauses (b) and (c) of Subdivision Fourth conditionally condemn two other types of discriminatory conduct. They condemn unfair treatment or unjust discrimination in the matter of "(b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of freight claims." Here we have the key to the meaning of "other discriminating or unfair methods" as used in Subdivision Third. They, like the refusal of cargo space, constitute practices relative to the physical facilities of a common carrier and its physical handling of the goods transported. In Subdivision Fourth these methods are banned when unfair or unjust. In Subdivision Third they are proscribed *per se* if practiced in retaliation against a shipper.

The penal nature of § 14 underscores the appropriateness of applying the *ejusdem generis* rule to give definite meaning to the otherwise all-inclusive character of the "other" methods embraced within subdivision Third. We submit that the thrust of subdivision Third is toward the prohibition of denial to shippers of common carrier facilities for various reasons. As in the case of subdivision First, it is the means, not the end, which is the evil against which the legislation was directed.[12] The obvious facility to be denied is available space accommodation. By application of the *ejusdem generis* rule, the forbidden "resort to other discriminating or unfair methods" would be limited to other denials of common carrier facilities. If illustrations are required of other such facilities which may be denied, they may be found in the parallel provisions of items (b) and (c) of subdivision Fourth, *i. e.*, the loading and landing of freight in proper condition, and adjustment and settlement of claims.

We submit that these are the reasons why subdivision Third speaks of "methods" and not of "contracts" and "rates". This choice of words was deliberate. Nowhere else in this Act, which is largely concerned with rate matters, is a rate practice designated a "method".

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[12] The vice of refusing available shipping space was particularly abhorrent to the drafters of the Shipping Act. Not alone do we find this method of discrimination absolutely condemned by § 14, Third, when used in retaliation, and conditionally condemned by § 14, Fourth, when unfairly and unjustly practiced. We also find that § 36, 39 Stat. 738, 46 U. S. C. § 834, authorizes the Secretary of the Treasury to refuse clearance to any vessel whenever it refuses to accept cargo from a citizen of the United States unless it has no available space accommodation.

The interpretation of § 14, Third, for which we contend, does not leave the subject of rates and contracts beyond the purview of the statute. Subdivision Fourth deals with unfair or unjustly discriminatory contracts based on the volume of shipments. Section 17 (46 U. S. C. § 816) forbids any common carrier by water in foreign commerce to "demand, charge, or collect any rate, fare, or charge which is *unjustly* discriminatory between shippers or ports, or *unjustly* prejudicial to exporters of the United States as compared with their foreign competitors." Whenever the Board finds a violation of the section, it is authorized to alter the rate involved "to the extent necessary to correct such *unjust* discrimination or prejudice" and to order the carrier to discontinue "any such *unjustly* discriminatory or prejudicial rate, fare, or charge." Similarly, § 16, First (46 U. S. C. § 815, First), forbids common carriers by water—

> "To make or give any *undue* or *unreasonable* preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever." (Italics supplied.)

Finally § 15 (46 U. S. C. § 814) authorizes the Board to disapprove any carrier agreement upon the making of one of three findings with respect thereto. One such finding is that the agreement is—

> "* * * *unjustly discriminatory or unfair as between carriers, shippers,* exporters, importers, or ports, or between exporters from the United States and their foreign competitors * * *." (Italics supplied.)

Thus our construction of the statute does not immunize conference rate practices against attack. Under § 14, First and Second, the deferred rebate and the fighting ship are illegal *per se*. Under § 14, Fourth, § 15, § 16, First, and § 17, discriminations in rate practices are illegal if "undue" or "unjust" or "unreasonable."

It is our view that the ultimate demonstration that § 14, Third, should not be construed so as to apply to rate matters rests on the incongruous result which would follow from such construction. It would render surplusage all of § 14, First, which outlaws deferred rebates as a means of obtaining exclusive patronage. Then Congress' meticulous fashioning of the definition of a "deferred rebate" will have no conceivable purpose. If § 14, Third, outlaws *per se* the dual-rate system as a method of retaliation against shippers who have patronized a competitor, then, *a fortiori*, § 14, Third, would outlaw the deferred rebate system. The deferred rebate system is definitely a means of discriminating against a shipper for employment of non-conference tonnage in a manner which is not at all true of the dual-rate system.

(d) Conceding *Arguendo* That § 14, Third, Can Apply to Rates, It Still Does Not Outlaw the Dual-Rate System.

For the purpose of the discussion under this head we assume that "other methods", as used in § 14, Third, may be interpreted as being sufficiently broad and ambulatory to include rate matters. Still that subdivision does not outlaw the dual-rate system.

The court below held that, although in terms the non-contracting shipper is charged the higher rate because he has not contracted, in reality the charge of the higher rate is retaliatory for patronizing another carrier. Yet the court recognized that this view of the dual scale of rates does not accord with the facts; for the lower rate is charged to a contract shipper even though, up to the moment of contracting, he may have patronized non-conference vessels exclusively; and the higher rate is charged to the non-contract shipper even though he may never have patronized an outside line. So the court stated that in any event the higher rates retaliate against a shipper for failure to sign the contract and this is retaliation "for any other reason" within the intendment of § 14, Third (R. 242; 239 F. 2d at 937).

In thus ruling the court erred in two respects: It made upon its own initiative a factual and economic determination that such a carrier practice is retaliatory, and it applied this conception of the term "retaliate" in such manner as to reject the Board's findings.

The verb "retaliate" has no established common law significance, nor is it a word of art in statutory draftsmanship. No instance of its interpretation in either context has been found. In common parlance it is a concept without clear-cut boundaries except for the connotation of vengeance—a deliberate reciprocation of injuries. Acts that may be retaliation in one case, may very readily not be retaliatory in another. Obviously the court below would not include in its concept of retaliation every situation in which A con-

tracts with B, but declines to extend the same privilege to C-Z in the absence of a willingness on their part to assume the same obligations that B has agreed to assume.

Turning to requirements contracts, it is equally plain that if the vendor makes no price concession to those who will contract for the purchase of their requirements, there is no retaliation against others. If, however, the element of discount in return for exclusive patronage is introduced, we submit that no one can dogmatize that the arrangement does or does not "retaliate" against the customer who does not contract for his requirements. One must first ascertain as a fact what motive is involved in giving the discount to the contractor and withholding it from the non-contractor. If the arrangement is motivated solely by the desire to secure to the seller the economic benefit of certainty of demand, there can be no retaliation. If the motivating factor is to "get even" with the non-contractor for patronizing a competitor, there may, in a loose sense, be retaliation.

The conclusion inevitably suggests itself that the evaluation of a given fact situation as retaliatory or not should, under the regulatory program of the Shipping Act, be made by the Board. So interpreted, § 14, Third, would require an analysis by the Board of any method—refusal or threatened refusal of space accommodations when available, or any other discriminating or unfair method—in order to determine whether its employment in the case at hand was for the purpose of retaliating against the shipper. With respect to a denial of space accommodations, the statute is express. If the denial is retaliatory, it is illegal *per se* under § 14, Third; if not, it is barred under § 14, Fourth.

only if unfair or unjust. Who decides whether the denial of space was retaliatory? Obviously the Board. So, too, "other discriminating or unfair methods" are illegal *per se* under § 14, Third, if practiced as a means of retaliation; otherwise they are illegal under § 14, Fourth, § 15, § 16 or § 17 only if undue, unjust or unreasonable. Here also *it is obviously for the Board to decide whether or not as a matter of fact the purpose is retaliation.*

In making this determination, the Board should properly consider whether or not the "method" was employed in such fashion as to be reasonably essential to the successful conduct of the proponents' enterprises and reasonable in its effects upon shippers and competing carriers, and whether its employment furthers the statutory policy of the Act. If the answer to these questions is in the negative, there may be retaliation. Otherwise there can be no retaliation.

Only if retaliation be found as a fact, does the *per se* concept properly become operative. The courts should respect the Board's conclusion in this regard depending "upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by * * * [the Board]; and with which that body, consequently, is better able to deal" (*United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485 (1932)).

The Board refused to make a finding of retaliation. It refused to find that there is retaliation *per se*. (R.

57-58). It did find reasonable and proper business motives for the adoption of the dual-rate system which negative any conclusion of vengeful or retaliatory motivation:

> "* * * The contract shipper, however, by enabling the conference lines to estimate the amount of cargo available for carriage, and accordingly, to plan vessel sailings and space in a more economical fashion, aids those carriers in reducing unit costs of carriage, and thus, to improve their services to shippers" (R. 35).

and

> "We consider the inauguration of a dual rate system to be a necessary competitive measure to offset the effect of non-conference competition in this trade. * * *" (R. 60).

and

> "The dual rate system by creating a basic core of cargo on which the conference can rely for the period of the contracts, will eliminate, for that period, the pressure on conference lines to reduce rates to meet Isbrandtsen's lower rate competition and will thereby create greater stability of rates and service, facilitate forward trading by shippers, and decrease the threat of rate wars." (R. 61-62).

and

> "* * * The spread is, as to those commodities capable of being carried by both Isbrandtsen and conference vessels, large enough to furnish protection to the conference lines against inducements to shippers offered by Isbrandtsen and small enough to enable Isbrandtsen to remain competitive with the conference. * * *" (R. 62).

These findings of fact of the Board negative any inference of fact or any conclusion of law that any retaliatory motivation was present. The Board's findings clearly indicate that the Conference Members were merely endeavoring to induce shippers to use their vessels in the expectation that this inducement would offset in part the inducement offered by Isbrandtsen to shippers.

The court below completely upset these detailed findings of a motivation completely divorced from any punitive purpose directed against any shippers. Instead the court, without any factual basis and without reference to the Board's findings, held that, as a matter of law, charging a higher rate to a person who does not contract than to a person who does contract is retaliation (R. 242; 239 F. 2d at 937):

> "* * * Furthermore, even though the shipper has not patronized another the higher rate constitutes retaliation because it is charged for failure to contract with the Conference. Section 14, Third, applies not only to retaliation for shipping by another carrier but for 'any other reason,' which would include failure to enter into the exclusive contract arrangement."

Here we have a clear statement that the making of a higher charge to one who does not contract than is made to one who does contract is, as a matter of law, retaliatory. We submit that the court misconceived its function under the Act in discarding the findings and conclusions of the Board.

Perhaps the court's conviction that the dual-rate system is retaliatory *per se* rested upon underlying concepts expressed in the concurring opinion, that

the system "is being used to penalize a shipper because he has patronized another carrier or at least reserved the right to do so;" and that the higher rate and the liquidated damage clause are "two essentially penal provisions * * * both imposed to coerce shippers to refrain from using non-Conference carriers" (R. 246, 247; 239 F. 2d at 939, 940). Whereas the stated conclusions in the principal opinion merely ignored the findings by the Board, the observations in the concurring opinion are directly contrary to those findings, which demonstrate that neither the non-contract rate nor the liquidated damages clause is either coercive or penal.

Even, therefore, if § 14, Third, can be construed to deal with matters of rates, it cannot be read so as to proscribe the dual-rate system *per se*. Absent a Board finding of retaliatory motivation, a dual-rate system is to be judged under § 16 of the Act in accordance with the criteria prescribed by *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304 (1937).

(e) No Violation of § 14, Third, Inheres in the Liquidated Damages Clause of the Shipper's Contract.

We submit that it is fundamental in this situation that if it be legally permissible for the Conference to enter into an exclusive patronage contract with a shipper, no element of illegality inheres in the provision for the payment of liquidated damages for the violation of the contract by the shipper. To hold that there may be a contract, but that the shipper may violate it without the payment of any damages would be in reality to hold that there may not be a contract at all. On the other hand, if it is proper

for the shipper to be held liable for provable damages, then there is no reason in law or in logic why the damages for breach may not be liquidated if their amount is difficult to prove and calculate. If, under the guise of stating liquidated damages, provision is inserted which is inordinately high as compared with the foreseeable loss, it will be denied enforcement as being unreasonable or penal, and the carriers will be relegated to collection of provable damages only. 3 Williston, Contracts (Rev. Ed. 1936) 2191-2194; Restatement, Contracts, § 339(1).

Of course, a stipulation for an unenforcible penalty would be a nullity. We believe that implicit in footnote 6 to the concurring opinion (R. 247, n. 11; 239 F. 2d at 940) is the concession that the liquidated damages in the shipper's contract adopted by JAGFC are not penal in nature. We shall below demonstrate that they are, indeed, reasonable.

A shipper's breach of his contract deprives a Conference Member of the opportunity to earn freight by carrying the cargo involved in the breach. Here the liquidated damages do not even take into account the real but unascertainable damages inflicted upon the stability of the Conference rate structure by one or a succession of contract violations by contract shippers. Instead they seek merely to compensate the members to a limited degree for the loss of revenue on the shipment lost to a cut-rate competitor.

The damages in such a case are analogous to dead freight. The measure of dead freight has been defined as follows in *The Rosemary*, 277 Fed. 674 (5th Cir. 1922). The Circuit Court of Appeals there

stated the holding of the District Court insofar as here relevant as follows (*id.* at 676):

> "* * * The court rendered a decree * * * awarding the appellee $22,478.95, that sum being the amount of dead freight on 487 tons of mahogany logs at $44 per ton, *less the ascertained cost of loading and unloading that amount of mahogany logs,* with interest from the date of completion of discharge at Gulfport of the Rosemary's cargo. * * *" (Italics supplied.)

In that case the shipper claimed, but did not prove, that the ship had saved a certain amount of time in port by reason of the shipper's omission to ship the goods in question. The Court of Appeals affirmed the ruling of the District Court as stated above and used the following language (*id.* at 679):

> "* * * As it was not made to appear that the charterer's failure to ship the amount of cargo stipulated for enabled the vessel to start on its voyage from Secondee sooner than it would have done, if the stipulations in that regard had been complied with, the above-mentioned claim that the vessel got the benefit of a saving of time to which it was not entitled is not well founded."

Hence in the absence of any showing by the shipper that the carrier saved ship's time by reason of his failure to ship, the carrier's damages are the contract freight less only the out-of-pocket expenses of loading and discharge. We also refer to: *The Gazelle,* 128 U. S. 474 (1888); *Steamship Company of 1912* v. *C. H. Pearson & Son Hardwood Co., Inc.,* 30 F. 2d 770, 773 (2d Cir. 1929); *New York & Cuba Mail S. S. Co.* v. *Guayaquil & Q. R. Co.,* 270 Fed. 200 (2d Cir. 1920), cert. dismissed *sub nom. Guayaquil & Q. R. Co.* v. *New York & Cuba Mail S. S. Co.,* 257 U. S. 642 (1921).

The record substantiates our claim that the damages as liquidated in the proposed JAGFC shipper's contract are really inadequate even on the dead freight basis. The Board found that the costs of loading and discharge in this trade amount to $8.50 a ton. The Board also found that when, during the rate war, rates had reached the level of $6.50 a ton, they were approximately 30% of pre-rate war rates (R. 31). This being so, it would appear that the pre-rate war rates must have been about $21.50 a ton. Upon these findings, dead freight or proper liquidated damages should have been at a minimum of $21.50 minus $8.50, or $13.00—an amount in excess of the 50% of the freight rate provided in the contract.

(f) Conclusion to First Point.

We submit that § 15 indicates that a competitive method such as the dual-rate system should be approved in the absence of the requisite findings for disapproval.

We submit that not only is the Shipping Act, and particularly § 14, Third, thereof, devoid of language apt to a *per se* prohibition of dual-rate systems; but, on the contrary, the language of § 15 contemplates the approval of dual-rate systems which are not, *in the opinion of the Board*, retaliatory against shippers or unjustly discriminatory against shippers or carriers.

The construction applied to the statute by the Court below not only lacks support in the literal language of the statute itself, but violates well-recognized canons of construction. It gives the broadest possible interpretation to a criminal statute. It renders a carefully drawn portion of § 14 surplusage. It ignores

the *ejusdem generis* rule. We submit that only a dire need for a forced and unnatural interpretation of a statute could justify the contravention of these well established guides to the proper reading of statutes. Here the need is, rather, for a construction in accordance with these rules to serve the public interest in attaining the objectives of the Shipping Act.

SECOND POINT

The decision below appears to be inconsistent with prior decisions of this Court.

We urge that the foregoing analysis of the Shipping Act itself, supported by our later consideration of its consistent administrative interpretation and its legislative history, will be persuasive to this Court that it should not depart from the determinations which it has already made with respect to the dual-rate system.

In three cases this Court has considered whether dual-rate systems are illegal *per se*. We submit that, carefully considered, these cases answer the question in the negative. Conferences generally have long considered these cases as authority for that proposition and so has the Board (R. 41, 44, 48, 50, 59-60). The court below referred to this contention but, after analysis of the cases, stated R. 244; 239 F. 2d at 938):

> "* * * This position is an arguable one; but the fact is that the cases do not decide the point. * * *"

United States Navigation Co. v. *Cunard S.S. Co.*, 284 U. S. 474 (1932), arose on a complaint by a

non-conference carrier seeking an injunction pursuant to the Sherman Act[13] and the Clayton Act[14] to restrain the respondent conference carriers from the employment of a dual-rate system in United States foreign trade. Since the case arose on motion to dismiss the bill, the allegations of coercion against shippers and exclusion of the complainant from the trade were taken to be true for the purposes of the decision (284 U. S. at 479-480). This Court held that the Shipping Act had *pro tanto* superseded the anti-trust laws; and that because questions of fact and discretion were involved in determining whether the Shipping Act had been violated, the matter was within the exclusive primary jurisdiction of the Board (*id.* at 485). The decree below dismissing the complaint was affirmed.

The opinion in *U. S. Navigation Co.* states clearly that the legality of a dual-rate system depends upon economic, business and competitive factors—that a factual issue is present. Thus, this Court said (284 U. S. at 485):

> "The act [the Shipping Act] is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. *Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries,*

[13] 26 Stat. 209, 15 U. S. C. §§ 1-7.

[14] 38 Stat. 730, 15 U. S. C. §§ 12-27.

and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. * * *" (Italics supplied.)

Again (284 U. S. at 487) the Court considered the contention that the Court should decide that, on the face of the statute, "the [dual-rate] agreement referred to in the bill of complaint cannot legally be approved", and rejected it in the following terms:

"* * * *A contention to that effect is clearly out of harmony with the fundamental purposes of the act* and specifically with the provision of § 22 authorizing the board to investigate *any* violation of the act upon complaint or upon its own motion and make such order as it deems proper. And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. *Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.*" (Italics supplied except as to "any" in the fourth quoted line.)

Lest it be contended that this Court was unmindful of § 14, Third, we quote from the opinion the following paraphrase of that section (284 U. S. at 483-484):

"* * * Section 14 prohibits retaliation by a common carrier by water against any shipper by

resort to discriminating or unfair methods because the shipper has patronized another carrier; * * *."

We submit that the language of this Court in *U. S. Navigation Co.* with respect to the dual-rate system is clearly to the effect that an agreement providing for such a system may be approved, disapproved or modified by the Board in accordance with the "attending circumstances". Our adversaries, however, have consistently brushed this case aside with the comment that it is only a primary jurisdiction case. Doubtless the import of this comment is that the language of this Court in *U. S. Navigation Co.* is mere dictum. This also is likely the implication in the remark of the court below (R. 244; 239 F. 2d at 938) that *U. S. Navigation Co.* and the other cases upon which we rely "do not decide the point."

It is a long-established principle that a bill or complaint in equity will not be dismissed if it states any claim upon which, on any theory, the relief sought may be granted. *Dioguardi* v. *Durning*, 139 F. 2d 774, 775 (2nd Cir. 1944); *Tauzin* v. *Saint Paul Mercury Indemnity Co.*, 195 F. 2d 223, 224 (5th Cir. 1952); *Clyde* v. *Broderick*, 144 F. 2d 348, 349 (10th Cir. 1944); *Johnson* v. *Fredrick*, 9 F. R. D. 616, 618 (D. Neb. 1949). Accordingly, even though the complaint stated no cause of action under the anti-trust laws, it would not have been dismissed if it did state a cause of action under the Shipping Act. The complaint would state a cause of action under the Shipping Act if a pure question of law were involved, *i. e.*, if the dual-rate system were illegal *per se*.

It is a well-established qualification to the primary administrative jurisdiction rule that where *a pure*

question of law is presented, with no area for the exercise of administrative judgment, the courts will not make the idle gesture of referring a case to an administrative agency when there can legally be only one outcome. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291-292 (1922). This doctrine and the case in which it was so clearly stated take on critical significance to the proper interpretation of *U. S. Navigation Co.* when it is appreciated that this Court in that case thoroughly considered *Great Northern Railway Co.* (284 U. S. at 481-482):

> "* * * In *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291, the general rule and an exception to it are considered. The immediate question there at issue concerned merely the legal construction of an interstate tariff, *no question of fact, either as an aid to the construction, or in any other respect, and no question of administrative discretion, being involved.* It was held that the issue was within the jurisdiction of the courts without preliminary resort to the commission. But the distinction between that case and one where preliminary resort to the commission is necessary was definitely stated. Such resort, it was said, must be had where a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, and also where it is necessary, in the construction of a tariff, to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction. In all such cases the uniformity which it is the purpose of the Commerce Act to secure could not be obtained without a preliminary determination by the commission. *Preliminary resort to the commission is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that*

determination is reached ordinarily upon voluminous and conflicting evidence; for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.'" (Italics supplied.)

In view of this reasoning in *U. S. Navigation Co.*, it would appear to be beyond dispute that this Court there weighed the question whether a *per se* statutory violation was involved. We urge that it is impossible to accept the view that *U. S. Navigation Co.* was entirely concerned with narrow technicalities of procedure. The jurisdictional point turned upon a far-reaching judicial doctrine which required that the case be retained in the courts if a pure question of law—a *per se* statutory violation—was involved; and reference in the first instance to the administrative agency definitely connoted that questions of fact and discretion were involved.

Twenty years after the decision in *U. S. Navigation Co.* this Court had before it the same basic question, varied only by the circumstance that the complaining party was the United States. *Far East Conference* v. *United States*, 342 U. S. 570 (1952), was a civil antitrust suit to enjoin a conference from continuing the use of its dual-rate system. The charge was violation of the Sherman Act,[15] and jurisdiction was invoked under § 4 of the Act.[16] The District

[15] 26 Stat. 209; 15 U. S. C. §§ 1 and 2.

[16] 26 Stat. 209; 15 U. S. C. § 4.

Court denied the defendants' motion to dismiss. 94 F. Supp. 900 (1951). On certiorari this Court reversed the judgment of the District Court, holding that the complaint stated a claim which was within the primary administrative jurisdiction of the Board and accordingly should be dismissed (342 U. S. at 576-577).

The decision in *Far East Conference* rested squarely on *U. S. Navigation Co.* (342 U. S. at 573):

> "* * * We see no reason to depart from *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474. That case answers our problem. * * *"

In *Far East Conference* this Court quoted extensively from *U. S. Navigation Co.*, and after such quotation applied the very criterion for which we have above contended—that *U. S. Navigation Co.* disposed of the problem of the dual-rate system as one raising *issues of fact and of administrative discretion.* So the Court said (342 U. S. at 574-575):

> "The Court thus applied a principle, now firmly established, that *in cases raising issues of fact* not within the conventional experience of judges *or cases requiring the exercise of administrative discretion,* agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and *the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances*

underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." (Italics supplied.)

Thus the majority in *Far East Conference* treated the problem of the dual-rate system as one involving issues of fact and of administrative discretion. The validity of our contention is emphasized by the dissenting opinion, which viewed the case as involving purely a question of law, with the conclusion that the complaint should not be dismissed and that the case should be disposed of by the courts (342 U. S. at 578-579):

"Why should the Department of Justice be remitted to the Board for its remedy? The Board has no authority to enforce the Sherman Act. If the rates were filed, of course the Board would have exclusive jurisdiction to pass on them. But even then it is restricted. Section 14, Third, for example, makes unlawful retaliation against any shipper by resort to discriminatory or unfair tactics because a shipper has patronized another carrier. And it would seem plain that when a shipper is charged one rate if he gives the Conference a monopoly of his business and another and higher rate if the shipper uses a carrier not a member of the Conference, the shipper is being retaliated against for shopping around among carriers."

The disposition and reasoning of *U. S. Navigation Co.* and *Far East Conference* lead, we submit, to the conclusion that this Court held the system not to be illegal *per se*.

Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297 (1937), arose on review of a decision of the Board

that the dual-rate system proposed by the Gulf Intercoastal Conference was unduly and unreasonably preferential and prejudicial in violation of § 16 of the Shipping Act (*Gulf Intercoastal Contract Rates*, 1 U. S. S. B. B. 524, 530 (1936)). Members of the conference brought a proceeding before a three-judge court in the District of Columbia to set aside the order of the Board. *Swayne & Hoyt, Ltd.* v. *United States*, 18 F. Supp. 25 (1936).

The District Court was "of the opinion that the admitted and undisputed facts bring the practice within the condemnation of the statute" (18 F. Supp. at 27). However, the court held the system illegal *per se*, not under § 14, Third, but under § 16.

This Court affirmed the decree of the District Court, but the opinion rested entirely upon the proposition that the question of validity of the dual-rate system was to be determined by the Board in accordance with the facts of the particular case and that its conclusions, if supported by evidence, would not be set aside.

The opinion quoted from § 16, First (46 U. S. C. § 815, First), and stated the issue as follows (300 U. S. at 303):

> "* * * The differential between appellants' rates on commodities transported under contract and the rates on the same commodities for non-contract shippers was prima facie discriminatory since the two rates were charged for identical services and facilities, and the narrow issue presented to the * * * [Board] for decision was whether, in the conditions affecting the traffic involved, the discrimination was undue or unreasonable."

The Court then defined the formula to be applied by the Board in determining the issue so described (300 U. S. at 304):

> "In determining whether the present discrimination was undue or unreasonable the * * * [Board] was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter. * * *"

The opinion noted that there was evidence from which the Board could reasonably conclude that there was little need for a dual-rate system in the trade involved and that the system would tend to give the conference carriers a monopoly by excluding competition from new lines (*id.* at 305). The Court wrote as follows with respect to the effect to be given to the Board's conclusions (*id.* at 304):

> "Such determinations will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment. See *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *Pennsylvania Co.* v. *United States*, 236 U. S. 351; cf. *United States Navigation Co.* v. *Cunard S. S. Co.*, *supra*, 484. Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. * * *"

It seems clear that this Court rejected the theory of illegality *per se* which underlay the District Court decision and that, on the authority of *U. S. Navigation Co.*, it held that the legality of dual-rate systems involves a factual determination in each case and that the Board's conclusions in each case must stand "if there is evidence to support them." Further, the contention of our adversaries that *Swayne & Hoyt, Ltd.*, did not reject the argument of illegality *per se* would consign this Court's prescription of the criteria to be applied by the Board to the status of a purposeless exercise in rhetoric.

Finally and most important, this Court, in footnote 3 to *Swayne & Hoyt, Ltd.* (300 U. S. at 307), considered whether § 14 prohibits the dual-rate system. The footnote is appended to the following sentence in the text (*id.* at 306-7):

> "* * * As the * * * [Board] has interpreted the evidence, the operation of the contract system, *in the circumstances of this case*, does not differ substantially from that of 'deferred rebates' outlawed in both foreign and coastwise shipping by § 14 of the Shipping Act, 39 Stat. 733, 46 U. S. C. § 812." (Italics supplied.)

It should be noted that the foregoing passage should not, as our adversaries have suggested, be read as indicating that dual-rate systems are, *under all circumstances*, indistinguishable from deferred rebate systems. The Court limited its finding relative to such similarity to circumstances existing under the evidence as it had been interpreted by the Board. The dual-rate system had been proposed by an intercoastal conference which was subject to the Intercoastal Shipping Act, 1933 (47 Stat. 1425; 46 U. S. C. §§ 843-848).

The Board had considered its powers over rates charged in intercoastal commerce—powers which it lacks with respect to individual carriers in foreign commerce under the Shipping Act—sufficient to enable it to enforce stability of rates on its own initiative in commerce between the coasts. Since the dual-rate system was therefore unnecessary to secure stability, its only purpose in the intercoastal trade was that of monopolizing the traffic for the combined lines.

Since the Board dealt with the foregoing factual situation under § 16 (46 U. S. C. § 815), and nowhere drew any analogy between the deferred rebate system and the dual-rate system, the above quoted passage is this Court's view that the Board's conclusion as to the effect of the dual-rate system *in the circumstances of that particular case only* did not differ substantially from the effect of prohibited deferred rebates. That the opinion cannot properly be read as making this observation applicable to all dual-rate systems appears from the footnote above referred to which, after quoting the § 14 definition of a deferred rebate, proceeds (300 U. S. at 307):

> "The report of the House Committee on Merchant Marine & Fisheries, H. R. Doc. 805, 63rd Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system 'is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature.' See, e. g., pp. 103-105, 200. The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates,' since it does not place him in 'continual

dependence' on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly the Committee did not condemn the contract system completely. Cf. W. T. Rawleigh Co. v. Stoomvaart, 1 U. S. S. B. 285. The policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. Eden Mining Co. v. Bluefields Fruit & S. S. Co., 1 U. S. S. B. 41."

We urge that this footnote constitutes a holding that dual-rate systems are not illegal *per se* under § 14, Third. Under any other view this Court could not have concluded that the Board had discretion under § 16 of the Act to hold systems legal or illegal, depending upon the conclusion drawn from the application of the prescribed criteria. This holding was based on an analysis of § 14, such as we have urged under our First Point, together with a consideration of the legislative history, which we will treat in our Fourth Point. The conclusion was that whereas deferred rebates were flatly prohibited, the legality of dual-rate systems was by statute left to be determined by the administrative agency upon a consideration of their economic impact upon transportation and trade in particular instances.

The concurring opinion below suggests two answers to our contention respecting footnote 3 to *Swayne & Hoyt, Ltd.* (R. 246, n. 7; 239 F. 2d 939-940, n. 2). The first answer implies that this Court mistook a recital by the Alexander Committee of a contention made to it for a finding made by it.

We submit that no mistake was involved. It is true that under the caption, "Disadvantages of Shipping Conferences and Agreements, as Now Conducted," the Committee stated (H. R. Doc. 805, 63rd Cong., 2d Sess. (1914) 307) that the deferred rebate should be prohibited, and stated its first reason as follows:

> "(1) By deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines for successive periods. *In this connection it is argued that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system.*" (Italics supplied.)

Under a previous caption (*id.* at 295 *et seq.*), the Committee enumerated advantages of shipping conferences.

That these discussions of advantages and disadvantages were findings and not mere recitals of contentions is indicated by the "Recommendations of the Committee." There (*id.* at 416) the Committee stated:

> "* * * (A classification of the advantages claimed as resulting from the aforementioned factors is presented on pp. 295 to 303 of the foregoing report.)
>
> "These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. * * *"

And (*id.* at 418) the Committee stated:

> "The Committee believes that the disadvantages and abuses connected with steamship agreements

and conferences as now conducted are inherent, and can only be eliminated by effective government control; and it is such control that the Committee *recommends as the means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of.*" (Italics supplied.)

It thus appears that the Committee found that the disadvantages, abuses and advantages which were recorded in its report, actually existed and that what was stated in one place as a contention, was later acted upon as a fact.

The second answer, suggested by the concurring judge below, to our argument regarding the significance of *Swayne & Hoyt, Ltd.*, is based upon the discovery of an asserted distinction between the shipper's contract form here involved and the contract before the Court in *Swayne & Hoyt, Ltd.* Indeed, this was stated to be the more significant answer.

In *Swayne & Hoyt, Ltd.*, this Court mentioned, and apparently considered relevant, only the two features which all exclusive patronage dual-rate systems have in common, *i. e.*, the dual level of rates, and shippers' contracts which accord only to signatories the lower of these levels (300 U. S. at 299). In those two particulars there is no distinction between the *Swayne & Hoyt, Ltd.*, contract form and the JAGFC form.

The *Swayne & Hoyt, Ltd.*, contract form may be found at 1 U. S. S. B. B. 525-526. The concurring opinion would distinguish between the *Swayne & Hoyt, Ltd.*, form and the JAGFC form on the ground that the rates in the former were not subject to change. Articles 3 and 5 of the actual *Swayne &*

Hoyt, Ltd., form show that the rates were subject to change by amendment or reissue of the tariff and that in applying the rates, the date of sailing was to govern. No notice of increase was required, the only limitation being the 30 day filing and posting period required by § 2 of the Intercoastal Shipping Act, 1933 (46 U. S. C. § 844). Further, the Board's Report (*id.* at 524-525) shows that the conference tariffs were to be effective only from October 3, 1935, to December 31, 1935. Certainly there can be no distinction in principle between that period of less than three months and the period of from two to three months which is the minimum time during which rates cannot be changed under the JAGFC form.

Next, the concurring opinion would distinguish between these two forms of contract on the ground that the carrier's obligation to transport was firmer under the *Swayne & Hoyt, Ltd.*, form. This contention is without substance. Article 3 of the *Swayne & Hoyt, Ltd.*, form contains the following proviso:

> "Provided space is available when application is made therefor."

Finally, the concurring opinion distinguished the two forms on the basis of liquidated damages provisions; but Article 4 of the *Swayne & Hoyt, Ltd.*, form provided that the liquidated damages would be additional freight "on all commodities theretofore shipped with such CARRIERS since the execution of this agreement, in the amount of the difference between the tariff contract rate or rates and the tariff non-contract rate or rates of the transporting carriers in force on such commodities at the time of such shipment." Thereby liquidated damages would depend on how

much cargo the violating shipper had previously consigned on conference vessels. The substantial shipper who makes a small shipment on an outside line would obviously bear a disproportionately high burden of liquidated damages. This type of clause has long since been condemned by the Board. *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11, 18-19 (1948).

We submit that the authority of *Swayne & Hoyt, Ltd.*, against illegality *per se* of the dual-rate system has been in no way impeached.

In the present case the Board analyzed the economic factors and conscientiously applied the yardstick prescribed in *Swayne & Hoyt, Ltd.*, by which dual-rate systems should be evaluated. Notwithstanding *U. S. Navigation* and *Swayne & Hoyt, Ltd.*, the court below gave little weight to the economic factors found by the Board and, although it recited the holding in *Swayne & Hoyt, Ltd.*, that a dual-rate system involves a *prima facie* discrimination, proceeded to a conclusion which deprived the *prima facie* character of the discrimination of all legal significance. It held that under no circumstances may the discrimination be justified.

We submit that the decision of the Court of Appeals is irreconcilable with *U. S. Navigation Co.*; which was reviewed and reaffirmed in *Far East Conference* in 1952, and with *Swayne & Hoyt, Ltd.*, cases which have served the Board and the industry as the key to the legal aspects of dual-rate systems for more than 20 years.

THIRD POINT

The Board has consistently interpreted the Shipping Act as not prohibiting dual-rate systems *per se*; and this consistent administrative interpretation is entitled to weight.

If we should be utterly wrong in our conviction that *U. S. Navigation Co., Far East Conference,* and *Swayne & Hoyt, Ltd.,* decide in our favor the issue of illegality *per se,* certainly they demonstrate that the statute does not clearly and without ambiguity demand the interpretation given to it by the court below. *Isbrandtsen Co.* v. *United States,* 81 F. Supp. 544, 546 (S. D. N. Y., 1948), appeal dismissed *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.,* 336 U. S. 941 (1949). Such doubt, betokening ambiguity, would justify a study of the consistent administrative interpretation of the statute and an analysis of the legislative history. Such study and analysis support our position.

It is doubtless true that prior to *Swayne & Hoyt, Ltd.,* the Board's decisions evidence an evolutionary process of formulating the factual standards to be determinative in each dual-rate case. Nonetheless, the Board's review of its decisions as set forth in its Report herein (R. 38-50) demonstrates that it has consistently held for more than 35 years that the dual-rate system is not illegal *per se.* However, those who assert illegality *per se* have introduced confusion on the point to such degree that, in an opinion in which the issue of illegality *per se* was not decided, a three-judge district court declared

passim, that the Board decisions have lacked uniformity and consistency (*Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 890-891 (1951), aff'd by an equally divided court *sub nom.*, *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 342 U. S. 950 (1952)).

The Board has always recognized that a prerequisite to proper conduct of our foreign trade is stability of ocean freight rates. Accordingly, it has condemned competition by rate cutting, whether by an individual line or a conference. Because rate cutting by an established differential is particularly destructive of rate stability, that type of rate cutting has been most severely condemned. *Section 19 Investigation, 1935*, 1 U. S. S. B. B. 470 (1935); *Rates, Charges and Practices of Yamashita and O. S. K.*, 2 U. S. M. C. 14 (1939); *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U. S. M. C. 342 (1940). The Board can stop rate cutting by conferences through its power to cancel the conference agreement if it operates to the detriment of our commerce (§ 15). Since the Board has no power over the individual rate cutter, conferences have traditionally resorted to the protective device of the dual-rate system.

The first administrative determination regarding the dual-rate system was *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1 U. S. S. B. 41 (1922). There the Board held that a dual-rate system practiced by a single carrier, "under the circumstances involved in this case," constituted an undue and unreasonable prejudice and disadvantage to, and an unjust discrimination against, complaining non-contract shippers, in violation of §§ 16 and 17 of the

Shipping Act (1 U. S. S. B. at 48). In this earliest case, however, the Board held that the dual-rate system there in evidence did not constitute retaliation and did not violate § 14, Third (*id.* at 46):

> "No evidence was adduced relating to any action of the respondent tending to show direct or indirect retaliation against the complainants for patronizing other carriers. Likewise, from the facts of record it is clear that the contracts for exclusive patronage complained of were not to any extent based upon volume of freight offered. That part of the complaint alleging violations by the carrier of paragraphs 3 and 4 of section 14 of the act is, therefore, without support."

This is a clear holding that a dual-rate system does not, without other evidence, constitute direct or indirect retaliation or violate § 14, Third—*i. e.*, such system is not illegal *per se*.

The Board next considered a dual-rate system in *Rawleigh* v. *Stoomvaart*, 1 U. S. S. B. 285 (1933). There a non-contract shipper filed a complaint alleging violation by the respondent conference of § 14, Third and Fourth; § 16, First and Second; and § 17 of the Shipping Act. The complaint specifically charged that the conference "resorted to discriminatory or unfair methods against complainant because complainant refused to agree to patronize respondent common carriers exclusively, 'or for any other reason' in violation of section 14 (third) of the Shipping Act, 1916" (1 U. S. S. B. at 286-287). The Board's report specifically stated that the complainant confined the issue to illegality *per se* (*id.* at 288).

The Board rejected complainant's contention (1 U. S. S. B. at 293):

> "The Shipping Act, which closely parallels the recommendations of the foregoing legislative committee [H. R. Doc. 805, 63d Cong., 2d Sess. 415-424 (1914)], does not forbid the contract rate practice as such; nor has the Board ever considered that the practice as a practice contravenes any of the regulatory provisions of the shipping statute. Similarly as in connection with other accepted modes of rate making, through it violation of the regulatory statute may be effected, as for example, in the Eden case, or where, as recognized by respondents upon brief, the spread between the contract and non-contract rates is such in amount as to constitute unlawfulness. This present proceeding, however, involves no issue respecting anything other than the lawfulness of the contract rate practice per se, and upon the record we have no hesitation in determining that, as urged by the respondents, their practice under attack has not upon such record been shown to be other than fairly justified by embrasive considerations of volume, regularity and flow of cargo. * * *"

In *Intercoastal Investigation, 1935*, 1 U. S. S. B. B. 400, 463 (1935), the Board held that a dual-rate system in intercoastal commerce, as practiced by the Gulf Intercoastal Conference and by two other carriers in that trade, violated §§ 16 and 18 of the Shipping Act, and distinguished *Rawleigh*, which involved foreign commerce (*id.* at 467). Once again the issue was resolved on the record in the particular case.

After the Board's decision in *Intercoastal Investigation, supra*, the Gulf Intercoastal Conference filed new dual-rate tariffs. Thereupon the Board instituted a proceeding reported as *Gulf Intercoastal Contract Rates*, 1 U. S. S. B. B. 524 (1936), the

order in which was reviewed in *Swayne & Hoyt, Ltd.* The Board found that the powers conferred upon it by the Intercoastal Shipping Act, 1933, 47 Stat. 1425, 46 U. S. C. § 843, *et seq.*, enabled it to stabilize rates and that this circumstance distinguished the case from *Rawleigh*. The Board concluded that the system was not justified by transportation conditions in the trade involved and was unduly and unreasonably preferential and prejudicial in violation of § 16 of the Shipping Act. 1 U. S. S. B. B. at 530. As a caveat to its comments regarding the lawfulness of the dual-rate system in foreign commerce, the Board remarked (*ibid.*):

> "It should be understood that the * * * [Board] is not here sanctioning all contract rate systems in foreign commerce. Whether any such system is lawful is a question which must be determined by the facts in each case."

Contract Routing Restrictions, 2 U. S. M. C. 220 (1939), was an investigation by the Board of the dual-rate systems of several Trans-Atlantic Conferences. The Board, though requiring modification of certain provisions of the form of shippers' contract, again held the system not to be illegal *per se* (2 U. S. M. C. at 225).

In *Pacific Coast European Conference*, 3 U. S. M. C. 11, 12 (1948), the Board, while again requiring a modification of the contract form, rejected the contentions of the Departments of Justice and Agriculture, which had intervened in the proceeding, that the system was illegal *per se* (3 U. S. M. C. at 16).

The more recent Board cases are in accord: *Isbrandtsen Co.* v. *N. Atlantic Continental Frt. Conf.*,

3 F. M. B. 235, 239-244 (1950), order set aside on other grounds *Isbrandtsen Co. v. United States*, 96 F. Supp. 883 (S. D. N. Y. 1951), aff'd. by an equally divided court sub nom. *A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., Inc.*, 342 U. S. 950 (1952); *In the Matter of the Statement of Trans-Pacific Freight Conference of Japan, filed under General Order 76* (F. M. B. Docket No. 743, slip opinion dated December 19, 1955); *Secretary of Agriculture of the United States v. North Atlantic Continental Freight Conference* (F. M. B. Dockets Nos. 725 and 751, slip opinion dated February 29, 1956).

Without exception the Board has interpreted the Shipping Act as not rendering dual-rate systems illegal per se.

Yet in 1956, thirty-four years after the Board's first decision on the point, the Court of Appeals, without mentioning the Board's decisions, found itself compelled to give the statute a meaning diametrically opposed to the Board's consistent interpretation, which has been based upon statutory language, legislative history, the supposed meaning of decisions of this Court, and considerations of regulatory policy. In discarding all of the policy considerations which have guided the Board's administration of the Act, the judgment below appears to have ignored the admonition of this Court in *United States v. Morgan*, 307 U. S. 183, 191 (1939), as applied and quoted in *Far East Conference*, 342 U. S. at 575:

> "'. . . court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without

> regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coördinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim.' * * *"

In the light of this delineation of the relationship between the judicial and the quasi-judicial administrative functions, and taking into account the emphasis on the limited nature of the function of judicial review in cases such as this (*Far East Conference*, 342 U. S. at 574-575; *Swayne & Hoyt, Ltd.*, 300 U. S. at 304, 306-307; *U. S. Navigation Co.*, 284 U. S. at 486-487), the decision below would appear to have disregarded completely the place of the administrative function in the interpretation of regulatory statutes. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130-131 (1944). It certainly cannot be reconciled with the principle that weight is to be given to consistent administrative interpretation. In *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472-473 (1915), this Court explained the rule and disposed of criticism of it as follows:

> "2. It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-

> makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."

Hundreds of millions of dollars have been invested by our government and by private parties in the building, for operation in the various United States foreign trades, of ships which incorporate the most advanced design. These moneys were invested on the theory that freight rates in United States foreign commerce could be stabilized by the dual-rate system, the only practicable defense, always regarded as lawful, against the kind of competition which would destroy such investments. If the consistent interpretation above outlined should now be abandoned, then rate competition will take the place of competition in quality of service; and the cheapest ship, entailing the lowest depreciation and the lowest insurance coverage, will be the most effective in the struggle for survival.

FOURTH POINT

The legislative history of the Shipping Act supports our interpretation.

The primary source of information as to the purposes of Congress in adopting the Shipping Act, is the Alexander Committee Report, H. R. Doc. 805, 63rd Cong., 2d Sess. (1914). It has been so regarded by this Court (*Swayne & Hoyt, Ltd.*, 300 U. S. at 307) and by the Board (R. 50-51).[17]

The significance of the Alexander Committee Report can only be fully appreciated in the light of the legislative climate which prevailed when the investigation was authorized. As early as April 4, 1911, a bill was introduced in the House of Representatives by Mr. Humphrey, who later served on the Alexander Committee, by the terms of which any foreign flag vessel owned by a person adjudged to be a party to a combination or conspiracy in violation of the Sherman Act, would be prohibited from serving United States ports under a penalty of $25,000; and the Post-

[17] Isbrandtsen has suggested that because the Alexander Report was submitted in 1914 and the Shipping Act was enacted in 1916, the lapse of time and the numerous Bills introduced in the interim deprive the Report of authority as legislative history. This position is not tenable. H. R. 15455, 64th Cong., 1st Sess. (1916), which became the Shipping Act, 1916, was accompanied by H. R. Report No. 659. This Report quoted verbatim the recommendations in the Alexander Committee Report and stated (p. 27) that the Alexander Committee recommendations had in large part been followed in framing §§ 15 to 21 (now §§ 14 to 20). We also refer to the debates on H. R. 15455, where H. R. Report No. 659, including the quotation of the Alexander Committee recommendations, was set forth. 53 Cong. Rec. 13429-13430 (Aug. 30, 1916).

master General would be directed to cancel ocean mail contracts with a party to such a conspiracy (H. R. 1290, 62d Cong., 1st Sess.).

On April 13, 1911, H. R. 4660, 62d Cong., 1st Sess., was introduced. This bill shows that when legislators sought to outlaw exclusive patronage contracts, they knew how to use express language to accomplish their purpose. Thus, § 23 of that bill provided, so far as here material:

> "That the making or offering to make a contract for the exclusive carriage of goods, wares, or merchandise, either to or from foreign countries; conditioned partly on the shipment of such goods in the future by no other vessel or line of vessels, or promising to make or making of payment of rebates of freightage thereon, in consideration of making such contract, by an owner or agent of any vessel or line of vessels, is hereby declared a misdemeanor, punishable by fine in a district court of the United States of not less than three thousand dollars or more than ten thousand dollars on each conviction of such owner or agent of any such offending vessel or line of vessels, and if under foreign registry, after the conviction of owner or agent as above, such vessel or line of vessels shall not thereafter be permitted either to land or to load cargo in the United States. [There followed further penal provisions.] * * *"

This bill struck at all rebates in consideration of exclusive patronage, and not only the deferred rebates condemned by the Shipping Act.

Mr. Humphrey introduced H. R. 23470 in the 62d Cong., 2d Sess., on April 17, 1912. This bill extended the proposed prohibitions in H. R. 1290, which he had introduced in the first session, to United States flag vessels.

Such was the trend of Congressional thought when the resolutions authorizing the Alexander Committee Investigation were introduced in the House (H. Res. 425, 62d Cong., 2d Sess. (February 24, 1912); H. Res. 587, 62d Cong., 2d Sess. (June 18, 1912)). Both resolutions (printed in H. R. Doc. 805, 63d Cong., 2d Sess. 8-9 (1914)) directed investigation of the combined activities of common carriers by water "for the purpose of fixing rates and tariffs, or of giving and receiving rebates, special rates, or other special privileges or advantages, or for the purpose of pooling or dividing their earnings, losses, or traffic, or for the purpose of preventing or destroying competition" (H. Res. 587, *supra*). The Committee was directed to investigate whether the agreements and practices of the carriers were in violation of the laws of the United States, and to report what legislation, if any, it should deem advisable in relation thereto.

The Committee had the cooperation of the Department of Justice, which placed before it the records in a considerable number of pending antitrust suits against conferences (*id.* at 4),[18] in which the conferences had raised the contention that the facts peculiar to shipping made the antitrust laws inapplicable. Due to the outbreak of World War I, the cases became moot, and the point could not be decided by this Court.

The hostility to conferences which prevailed at the outset of the investigation disappeared when the Com-

[18] *United States* v. *Hamburgh-American S. S. Line*, 216 Fed. 971 (S. D. N. Y. 1914); rev'd as moot, 239 U. S. 466 (1915); *United States* v. *Prince Line*, 220 Fed. 230 (S. D. N. Y. 1915), rev'd as moot, 242 U. S. 537 (1917); and *United States* v. *American-Asiatic S. S. Co.*, 220 Fed. 230 (S. D. N. Y. 1915), rev'd as moot, 242 U. S. 537 (1917).

mittee learned of the advantages to all commercial interests of combined steamship activities; and in the end, the very core of the Committee's recommendations was that conferences should be permitted to operate under agreements filed with and approved by a government agency and operating under agency regulation.

After describing and analyzing the agreements and competitive practices found to exist in the various foreign trades of the United States, the Committee's Report enumerated the advantages and disadvantages to shippers and carriers of conferences and their practices (H. R. Doc. 805, 63d Cong., 2d Sess. (1914) 281-314). The Report set forth various methods used by conferences to control competition among the member lines, and also described the methods of "meeting the competition of lines outside of the Conference" (*id.* at 287).

The first method set forth was the deferred rebate system. The essential features of such systems were described in terms foreshadowing the language of § 14, First (*id.* at 287). However, the following feature of the deferred rebate system, as practiced in some trades, requires special note. The Committee said (*id.* at 288):

> "* * *. Moreover, as has been repeatedly pointed out in this volume, shippers require, above all else, a regular service, and in this connection the testimony shows that by patronizing an outside line the shipper would not only forfeit his rebates *but could be penalized by being denied accommodations for future shipments even at the full rates of freight. Such retaliation would leave the shipper unprotected* since an independent line

is not large enough to supply him with tonnage at all times. * * *". (Italics supplied.)

Here the concept of retaliation is introduced. There is no reference to this concept in § 14, First, of the Shipping Act, but it does appear in § 14, Third. The retaliation adverted to by the Committee was denial of accommodations *even at the full rate of freight,* because a shipper had patronized a line not a party to the deferred rebate system.

The fighting ship practice was described by the Committee in terms of obvious disapproval (*id.* at 289-290).

The Report discussed the various types of contracts with shippers used by conference lines to meet outside competition (*id.* at 290-292). We quote the Committee's description of the first category of contracts because it appears so clearly to demonstrate that the Committee very well knew of the existence of dual-rate systems (*id.* at 290):

> "*(a) Joint contracts made by the conference as a whole.*—Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i. e. are willing

at all times to contract with all shippers on the same terms."

Here are briefly described the essential features of a dual-rate system. The contracts were not contracts for the carriage of specific shipments. Each line was to carry "its proportion of the contract freight as tendered from time to time". There was no ironclad undertaking of the conference lines to carry each shipment as tendered. Rather did they "agree to furnish steamers at regular intervals". There definitely were dual-rates, since "The rates on such contracts are less than those specified in the regular tariff," and all shippers were afforded the opportunity to contract on the same terms.

Significant is the absence of any reference to "retaliation" in the description of these dual-rate systems, such as appeared with reference to the denial of space accommodations earlier in the report. There also is no reference to guaranteed price, definite period, bona fide requirements, or any other characteristics which the concurring opinion below found to be distinguishing features of the contracts before the Alexander Committee (R. 247; 239 F. 2d at 940). The contracts to which the Court of Appeals referred were probably those described by the Alexander Committee under caption (*b*), *i. e.*, "Contracts made by the individual members of the conference * * *". That such contracts were in evidence before the Committee in no way detracts from its finding of the existence of dual-rate contracts similar in their essential features to those involved in this case. Certainly the Alexander Committee believed that it had studied contracts which are indistinguishable from the proposed

JAGFC form, and the legislation which it recommended was conceived in that belief.[19]

In the light of the foregoing, it should, we believe, suffice to cite one dual-rate system which was in evidence before the Alexander Committee. To do so requires reference not only to the document introduced, but also to the testimony of the shipping man through whom it was introduced. Mr. Alexander inquired of Mr. Paul F. Gerhard, General Agent for the Prince Line, regarding contracts with shippers in the various trades in which the Prince Line was a conference member. Mr. Gerhard, after stating that in the River Plate trade the larger shippers were the first to contract, testified (*Proceedings of the Committee on the Merchant Marine and Fisheries*, 62nd Cong., 2nd Sess., Vol. 1 (1913) p. 246):

> "Mr. Gerhard. * * * When we finally close a contract with one of these houses, which generally is for agricultural machinery, *at lower rates than our tariff rates*, being such large quantities, you know, why, the other houses fall in

[19] In 1918, but two years after the enactment of the Shipping Act, Professor Emory R. Johnson of the University of Pennsylvania, one of the economic experts of the Alexander Committee, collaborated with Professor Grover Huebner, also of Pennsylvania, in publishing "Principles of Ocean Transportation". At pp. 288, 289, they described the deferred rebate and the fighting ship and observed that both had been outlawed by the Shipping Act. They next described the dual-rate system in terms generally similar to those in the Alexander Report and remarked that contracts were usually open to all shippers alike, but that the system "has at times been a source of discrimination". With regard to the effect of the Shipping Act on the dual-rate system, their language was: "The Shipping Act, however, prohibits unfair discriminations in the future". Since private commercial ship operations practically ceased during the war years 1914-1918, the foregoing constitutes contemporaneous evidence that the dual-rate system was well known at the time of the Alexander investigation and that there was no intention to outlaw it *per se*.

line and close contracts on the same terms. After these big shippers have those lower rates we feel it is but right and proper that the small shippers should have the same rates, and for that reason we then offer those smaller shippers contracts on identically the same terms, so as to give them all a chance to work on the same basis. * * *" (Italics supplied.)

So that there may be no doubt that different rates would be charged shippers who did and shippers who did not enter into contracts, we quote the colloquy between Mr. Gerhard and Rep. Stephens (*id.* at 264):

"Mr. Stephens. 'If the smaller shipper refused to make a contract, or does not make a contract with you when the terms are offered him, can he get the same rates, or what rate does he get?

Mr. Gerhard. He gets the tariff rate.

Mr. Stephens. He can not obtain the smaller rate?

Mr. Gerhard. He can get it on the same terms as the other people are getting it. * * *"

Numerous contracts entered into pursuant to the described arrangement were received by the Committee as exhibits (*id.* at 246-263). None of these contracts was referred to in the footnote to the concurring opinion below. Reference to one of these contracts (*id.* at 248) suffices to show that its terms do not support a distinction in principle from the contract form proposed by JAGFC. The January 21, 1910, contract entered into by the Prince Line on behalf of the conference lines with Guinle & Co., requires exclusive patronage by the shipper with respect to all merchandise dispatched by it from New York to Brazil. The carriers' undertaking was "to provide space *on receipt of ample notice of your requirements.*"

The contract was to be effective for 3 months following the month of execution and to continue in force thereafter subject to 30 days notice of withdrawal. It may be noted that in other contracts set forth on succeeding pages of the *Proceedings* there is a provision that in the event of reduction in the rates to any other shipper, the contract shipper is to have the benefit of such reduction.

Thus there was no absolute undertaking to supply the shipper's requirements for space regardless of other commitments, and that the conference lines had no "hedge" against reductions in rates, as suggested by the concurring opinion below. Similarly, the shipper was not insured against rate increases except for the initial 3 month period of the contract, since thereafter the conference would be free to cancel on 30 days' notice if it desired to increase the rates. It thus appears that the concurring opinion erred in its view that the omission of Congress specifically to condemn the dual-rate system is without significance because Congress did not, when adopting the Shipping Act, know that dual-rate systems existed (R. 247-248; 239 F. 2d at 940). The legislative history proves that Congress had full knowledge of existing dual-rate systems.

And it cannot be overemphasized that even if the contracts today were of the same kind as the concurring opinion believed they were in 1913, nonetheless both opinions would have struck down such contracts inasmuch as they would involve discrimination and, in the eyes of the court, retaliation; for the non-contract shipper in 1913 paid the higher rate (discrimination) for the reason that he did not contract (retaliation).

We believe that we are fully justified in asserting that the omission of Congress to outlaw dual-rate systems *in haec verba* cannot be ascribed to a lack of knowledge of their existence, and must be explained by a deliberate intention not to outlaw such systems, but rather to subject them to administrative regulation within the framework of the statute.

The Committee set forth (H. R. Doc. 805, 63d Cong., 2d Sess. (1914) 295-303) the advantages secured through agreements and cooperative understandings "as presented to the Committee". For brevity's sake we quote only the main captions in this portion of the report.

"*I. Improvement in service:*"

"*1. Regularity of service, resulting in the following advantages:*" [*Itemizing 7 advantages.*]

"*2. Greater security is given to capital invested in the steamship business*"

"*II. Stability of rates over long periods of time*"

"*III. Uniform freight rates secured to all merchants.*"

"*IV. Prevent the elimination of weaker lines in the various trades.*"

"*V. Maintenance of rates from the United States to foreign markets on a parity with those from other countries*"

"*VI. Reduction in the cost of service, eventually resulting in lower freight rates for a high standard of service.*"

"*VII. Cost of service can be more economically distributed over the traffic so as to develop the trade.*"

Following the advantages, the Committee enumerated the disadvantages of shipping conferences and agreements as then conducted (*id.* at 304-307). In the course of this discussion, the Committee stated (*id.* at 306):

> "4. Conference lines, through their monopolistic powers, so completely dominate the shippers with whom they deal that these shippers can not afford, *for fear of retaliation,* to place themselves in a position of active antagonism to the lines by openly giving particulars of their grievances. This condition is well illustrated by the frequency with which communications, addressed to the Committee, referred to the confidential nature of the information furnished. * * *" (Italics supplied.)

This new reference to retaliation contains no indication whatsoever of the means of retaliation before the Committee. Doubtless this is explained by the second sentence, which indicates that the "fear" was deduced by the Committee from the request of shippers for confidential treatment of their replies to inquiries, and had no substantial foundation in any instance of a particular retaliatory act. Doubtless, this experience led the Committee to recommend the prohibition of retaliation because a shipper "has filed a complaint charging unfair treatment" (p. 90, *infra*) and caused Congress to include the same language in § 14, Third.

The true nature of the retaliation of which the Committee had actual evidence is indicated at pp. 164-5 of the Report. After setting forth the deferred rebate system in use in the homeward trade from Brazil, the Committee described the difficulties thereby created for non-conference services in part as follows:

> "* * * Not only did the shippers wish not to

> lose the rebates that had accumulated, by patronizing the Pan American Mail Line * * *, but they were possessed with the fear that if they used the Pan American Mail Line's steamers the syndicate lines would, on one pretext or another, *retaliate by refusing them accommodations* on their subsequent shipments both in the American and European trade. (Vol. 1, p. 87.)" (Italics supplied.)

Again, at p. 165, the Report states:

> "* * * Moreover, the representatives of the Pan American Mail Line charged that the opposition lines not only threatened shippers with the loss of their rebates in both the American and European trades, but let it be known that they would *refuse to accept any longer the cargoes of disloyal shippers* and would also start an opposition service with a view to running the American line out of the trade. (Vol. 1, p. 19.)" (Italics supplied.)

We also refer to pp. 166-167 of the Report.

We submit that the proof is overwhelming that the concept of retaliation, founded on the evidence before the Alexander Committee and expounded in its Report, relates to refusal to extend to a shipper the physical services of a common carrier because he has done one of a number of things considered inimical to the carrier's interest. Nowhere is there the slightest intimation that the concept of retaliation applied to rates or exclusive patronage contracts.

The mass of evidence from all segments of our economy concerned with foreign commerce persuaded the Committee that the abolition of combined carrier

action would be injurious to our economy and that the only logical course should be regulated carrier combinations. The Committee concluded that conferences should not be prohibited but authorized and regulated so as to retain their advantages and at the same time prevent their abuses (*id.* at 416-417):

> "* * * It is claimed that the adoption of the first course—the prohibition of cooperative arrangements between practically all the lines in nearly all the divisions of our foreign trade—would not only involve a wholesale disturbance of existing conditions in the shipping business but would deprive American exporters and importers of the advantages claimed as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination. (A classification of the *advantages claimed* as resulting from the aforementioned factors is presented on pp. 295 to 303 of the foregoing report.)
>
> "*These advantages, the Committee believes, can be secured* only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. *It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade.* Most of the numerous agreements and conference

arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. *To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership.* Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. *Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States.* They are as universally used in the foreign trade of other countries as in our own. *The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.*" (Italics supplied.)

So the Committee commended rate stability as a prerequisite to the prosperity of our international trade, and advocated the conference as the instrumentality for ensuring stability. So, conversely, the Committee condemned rate-cutting competition and the inevitable rate wars as detrimental to our commerce. It is unthinkable that the Committee, animated by such conceptions, or that Congress, acting upon its recommendations, could have entertained the purpose, in the use of the most inapt language of § 14, Third, to condemn *per se* by implication the one remaining means which would enable conferences to exist and to accomplish their stabilizating function.

In summarizing the complaints against conference activity, the Committee said (*id.* at 417):

> "* * * A considerable number of complaints were also filed with the Committee objecting to excessive rates, discrimination between shippers in rates and cargo space, indifference to the landing of freight in proper condition, arbitrariness in the settlement of just claims, failure to give due notice to shippers when rates were to be increased, refusal to properly adjust rates as between various classes of commodities, and *the unfairness of certain methods—such as fighting ships, deferred rebates, and threats to refuse shipping accommodations—used by some conference lines to meet the competition of nonconference lines.* * * *" (Italics supplied.)

This enumeration is most pertinent to the solution of the question of interpretation involved in this case. The methods of meeting outside competition complained of as unfair, included "threats to refuse shipping accommodations". There is no mention of a dual-rate system based upon exclusive patronage contracts.

The recommendations of the Alexander Committee relating to carriers in foreign trade (*id.* at 415-421) concluded with seven numbered items. The first item stated a broad concept that ocean carriers should be brought under the supervision of an administrative agency as to their rates, agreements, and practices affecting the interests of shippers. The second item proposed that agreements with other carriers, with American shippers and railroad companies should be filed for approval and, to the extent that it related to inter-carrier agreements is a precursor of § 15. These two items bear out our contention that the entire legislation must be read as a broad grant of admin-

istrative discretion, specifically limited only by the exceptions clearly and expressly stated in the Act. From the standpoint of this litigation, however, the sixth recommendation is the most conclusive (*id.* at 421):

> "(6) That the use of 'fighting ships' and deferred rebates be prohibited in both the export and import trade of the United States. Moreover, all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason."

Here, as in § 14, Third, of the Shipping Act, the second sentence, which deals with retaliation, contains no mention of dual-rates or any other rates, and is equally silent regarding exclusive patronage contracts. The specific method of retaliation set forth is "refusing space accommodations when such are available," followed by the general language of "resorting to other unfair methods of discrimination."

We submit that the legislative history supports the statutory interpretation which we have urged in our FIRST POINT. It underscores the appropriateness of the application of the *ejusdem generis* doctrine in determining the scope to be given to the phrase "other discriminating or unfair methods," appearing in § 14, Third. So applied, the doctrine precludes application of the section to rates and contracts. The legislative history likewise demonstrates that when the Alexander Committee omitted to recommend and when Congress omitted to enact, specific prohibitions of dual-

rate systems, both had full knowledge of the existence of such systems; and, accordingly, the concurring opinion below erred in founding its conclusion upon the absence of such knowledge.

We submit that the Committee's action in omitting condemnation of the dual-rate system as such rested on recognized principles of shipping, to which we adverted at pp. 7-11, 29-30, *supra* (*id.* at 309, 310). Deprived of the only defense not specifically condemned by the Alexander Committee—the dual-rate system—a conference would have no alternative but to meet rate-cut with rate-cut with the inevitable result of a disastrous rate war and a dissolution of the conference itself.

The obviously conscious decision of the Alexander Committee to leave to the conferences the device of the dual-rate system, while proscribing deferred rebates, is undoubtedly to be explained upon the premise stated in the footnote to *Swayne & Hoyt, Ltd.*, 300 U. S. 297, 307 (1937), quoted *supra* at pp. 61-62.

The subsequent legislative history has been equally favorable to our position. Dual-rate systems have been openly and notoriously practiced by numerous conferences and repeatedly referred to in the Board's Annual Reports to Congress.[20] Congress has repeat-

[20] United States Maritime Commission, *Report to Congress for the Period of October 26 to December 31, 1936* (1937) 15; United States Maritime Commission, *Report to Congress For the Period Ended October 25, 1939* (1940) 24; United States Maritime Commission, *Report to Congress For the Fiscal Year Ended June 30, 1948* (1949) 25, 27; United States Maritime Commission, *Report to Congress For the Fiscal Year Ended June 30, 1949* (1950) 48, 53-54; *Annual Report of the Federal Maritime Board and Maritime Administration* (1950) 44, 49; *Annual Report of*

edly made thoroughgoing revisions of our shipping policy, e. g., The Merchant Marine Act, 1928, 45 Stat. 689, 46 U. S. C. § 891, *et seq.*; The Merchant Marine Act, 1936, 49 Stat. 1985, 46 U. S. C. § 1101; and numerous amendments in 1938 to the Merchant Marine Act, 1936 and the Shipping Act (Act of June 23, 1938, c. 600, 52 Stat. 953). Yet in none of these numerous revisions has Congress made any effort to interfere with the Board's action with respect to dual-rate systems.

In the final Report of the Senate Committee on Interstate and Foreign Commerce entitled, "*Merchant Marine Study and Investigation,*" 81st Cong., 2d Sess. (1950), the Committee emphasized that "as long as all shippers get the same privileges, large or small, and as long as all shipowners, large or small, may participate in a conference arrangement, such arrangements would appear to be in the public interest. The small export shipper has been vociferous in the defense of the contract rate system, as it has enabled him to get equal rate treatment and thereby compete successfully in world markets with the larger shippers" (p. 85). The Committee concluded that "from the standpoint of national security and from the point of view of the American shipper, the conference system has paid off in stability of rates and improved quality of service" (p. 86).

It follows that not only did Congress in 1916 omit any condemnation of the dual-rate system, but it has

the Federal Maritime Board, Maritime Administration (1951) 84; *Annual Report of the Federal Maritime Board, Maritime Administration* (1952) 39; *Annual Report of the Federal Maritime Board and Maritime Administration* (1953) 38-39, 41, 43-44; *Annual Report of the Federal Maritime Board and Maritime Administration* (1954) 31, 32, 34-36.

in the ensuing 40 years, with full knowledge of its use, refrained from interfering with the Board's administration of this conference instrumentality.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX

Selected Provisions of the Shipping Act, 1916, as Amended.

SEC. 14. (46 U. S. C. § 812). That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when

such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

SEC. 15 (46 U. S. C. § 814). That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings

between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen

hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

SEC. 16 (46 U. S. C. § 815). That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect what-

soever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

SEC. 17 (46 U. S. C. § 816). That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or

collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

SEC. 18 (46 U. S. C. § 817). That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own

route and points on the route of any other carrier by water.

No such carrier, shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause shown may waive such notice.

Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carriers is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

SEC. 19 (46 U. S. C. § 818). That whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water, it shall not increase such rates unless after hearing the board finds that such proposed increase rests upon changed conditions other than the elimination of said competition.

SEC. 22 (46 U. S. C. § 821). That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking

reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.

SEC. 23 (46 U. S. C. § 822). Orders of the board relating to any violation of this Act shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the United States Maritime Commission, other than for the payment of money, made under this Act, as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

SEC. 25 (46 U. S. C. § 824). That the board may reverse, suspend, or modify, upon such notice and

in such manner as it deems proper, any order made by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except special order of the board, operate as a stay of such order.

SEC. 32 (46 U. S. C. § 831). That whoever violates any provision of this Act, except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by fine not to exceed $5,000.

SEC. 36 (46 U. S. C. § 834). The Secretary of the Treasury is authorized to refuse a clearance to any vessel or other vehicle laden with merchandise destined for a foreign or domestic port whenever he shall have satisfactory reason to believe that the master, owner, or other officer of such vessel or other vehicle refuses or declines to accept or receive freight or cargo in good condition tendered for such port of destination or for some intermediate port of call, together with the proper freight or transportation charges therefor, by any citizen of the United States, unless the same is fully laden and has no space accommodations for the freight or cargo so tendered, due regard being had for the proper loading of such vessel or vehicle or unless such freight or cargo consists of merchandise for which such vessel or vehicle is not adaptable.